Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1246

FRANK P. PARISH AND
THEODORE FISHER PARISH,
Petitioners,

v.

MARYLAND & VIRGINIA MILK PRODUCERS ASSOCIATION, INC., et al,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FRANK P. PARISH
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IN THE

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MARYLAND & VIRGINIA MILK PRODUCERS ASSOCIATION, INC., et al,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Parish, pray that a writ of certiorari issue to review the opinion and judgment of United States Court of Appeals for the Fourth Circuit rendered November 3, 1978 without a hearing.

OPINIONS BELOW

Fourth Circuit. The unreported opinion of the Court of Appeals for the Fourth Circuit (App. A, *infra.* pp. 1-8).

District Court. The unreported opinion of The United States District Court for the District of Maryland (App. B, *infra,* pp. 9-17).

JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. Section 1254 (1) *to review the opinion and order* of The Fourth Circuit Court of Appeals entered on November 13, 1978.

QUESTIONS PRESENTED

1. Whether or not the United States Court of Appeals for the Fourth Circuit erred in summary of opinion of the District Court opinion of this matter.

2. Whether or not the United States Court of Appeals for the Fourth Circuit erred in conclusions of law set forth in its opinion on summary affirmance specifically:

A. Whether the Court erred in treating the matter of Declaration of Trust as res judicata;

B. Whether the Court erred in refusing to order a hearing to determine the existence of facts which would take the allegations of fraud outside of the operation of any of the defenses pleaded;

C. Whether the Court erred in refusing to order a hearing to invoke the equity jurisdiction of the courts to remedy fraud;

D. Whether or not the Court below erred in refusing a hearing on this pro se complaint;[1]

E. Whether or not the Court misquoted prior decision in the determination of both opinions below.

PROVISIONS INVOLVED

Annotated Code of Maryland, Article 23 §349 to §377 does not prohibit a cooperative from contracting as a Trustee, but actually provides for such relationship herein. See Appendix 10 (Page 174) to Appellants' Brief No. 78-1079.

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[1] *Haines v. Kermer, et al,* 404 U.S. 519-521 Per Curiam.

" . . . The only issue now before us is Petitioner's contention that the District Court erred in dismissing his pro se complaint without allowing him to present evidence on his claims . . . we cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears beyond doubt that the Plaintiffs can prove no set of facts in support of his claim which would entitle him to relief."

Conley v. Gibson, 355 U.S. 41, 45-46 (1957). See *Dioguardi v. Durning*, 139 F.2d 174 (CA 2 1944).

". . . Accordingly, although we intimate no view whatever on the merits of Petitioner's allegations, we conclude that he is entitled to an opportunity to offer proof. The judgment is reversed and the case is remanded for further proceedings herewith." (cited by the Court - App. B. page 16).

CONCISE STATEMENT OF THE CASE

A. This is an action in fraud against the Maryland and Virginia Milk Producers Association, Inc., which basically alleges that the Association, through its' officers, directors and counsel, defrauded its many members, including Petitioners Parish, by diversion and misappropriation of funds, improper accounting procedure, misrepresentation, and concealment of facts (vital to Association's solvency) from the membership and the Government, which directly violates the Trust Relationship between the Association and it's members.[2] *This, a separate independent action,* was filed pro se, in desperation after engaging and discharging three lawyers, *in prior action*, for willful failure to introduce evidence vital to defendant association's solvency and the best interest of their clients.[3] See paragraphs 77A, 78, 82 and 83 (Appendix to Appellants' Brief No. 78-1079) of Complaint repreated herein, also 79, A, B, C, D, and 80. Said prior action was dismissed on Demurrer, appealed, reversed and remanded (250 Md. 512 (1968)) (Parish v. Maryland & Virginia Milk Producers Association, Inc.

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[2] "One standing in the relation of a Trustee to another owes to the other the duty of making a full disclosure of all matters appertaining to the Trust, and neglect to do so . . . is a "fraudulent act" and that duty exists independently of inquiry in judicial proceedings, and persistent failure of that duty in judicial proceedings to the prejudice of the other and the advantage of the Trustee is "extrinsic fraud". *Kaufmann v. McLaughlin*, 114 P.2d 929, 189 Okl. 194.

[3] *Laun v. Kipp*, 155 Wis. 347, 145 N.W. 183, 5 A.L.R. 655-675:

"Marshall, J. . . .

B. This is an appeal on the pleadings inasmuch as no trial on the merits and no oral argument on appeal have thus far been allowed.

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footnote[3] (continued)

P. 655: "When the fiduciary position of Respondent is considered and that Appellants had used due care to employ attorneys whom they had reasonable ground to suppose were competent to protect their interests . . a Court of Equity should not refuse to open its doors to prevent the success of a wicked scheme to cheat because of neglect at this point. It was Respondent who should have been the moving party as regards the accounting . ."

P. 659: "If the judgment is inequitable and unjust as rendered, as was induced by fraud or other circumstances in the proceedings leading up to its entry which will warrant equitable relief, *that relief can be obtained only by a separate action.*

"Where the remedies are infirm, precedence will be a constant guide, but never a bar. Where a new condition exists, and legal remedies are inadequate, or none are afforded at all, the never failing capacity of equity to adapt itself to all situations will be found equal to the case . ." (*McGowan v. Paul*, 181 wis. 388, 396, 123 N.W. 256 . . . *Stowell v. Eldred*, 26 Wis. 504 . . .).

"There, for the first time, the precise nature of the fraud which will render a judgment open to attack in an independent action in equity was thus stated . . . The real principle of the adjudications is the power of equity to relieve against unconscionable judgments . ."

C. Memorandum and Order by the Federal District Court (App. A & B) states:

> "The earlier campaigns of this crusade are described in *Parish v. Maryland and Virginia Milk Producers Association*, 250 Md. 242 A.2d 512 (1968- Parish I),

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footnote[3] (continued)

Zinc Carbonate Co. v. First National Bank, 103 Wis. 125, 74 Sm. St. Rep. 845, 79 N.W. 229; *Crowns v. Forest Land Co.*, 102 Wis. 97, 78 N.S. 433; *Barber v. Rukeyser*, 39 Wis. 590; *Hiles v. Mosher*, 44 Wis. 601; *Coon v. Seymour*, 71 Wis. 419; *Johnson v. Coleman*, 23 Wis. 452, 99 Am. Dec. 193; *Nye v. Sochor*, 92 Wis. 40, 53 Am. St. Rep. 896, 65 N.W. 854; *Balch v. Beach*, 119 Wis. 77, 95 N.W. 132; *Boring v. Ott*, 138 Wis. 260, 19 L.R.A. (N.S.) 1080, 119 N.W. 865; *United States v. Throckmorton*, 98 U.S. 61, 25 L. ed. 93; *Uecker v. Thiedt*, 133 Wis. 148, 113 N.W. 447; *Marshall v. Holmes*, 141 U.S. 589, 35 L. 2d 870, 12 Sup. Ct. Rep. 62; *Pico v. Cohen*, 91 Cal. 129, 13 L.R.A. 336, 25 Am. St. Rep. 159, 25 Pac. 970, 27 Pac. 537 . . .

P. 666: "It would be a strange weakness in our system of equity jurisdiction, if a Court could not, or would not lend its aid to prevent a party from being greatly wronged by reason of his attorneys . . . being imposed upon by the adverse party."

P. 668: "The crowning purpose of Courts is to effect justice . . ."

P. 669: "In all situations and under all circumstances, whether new or old, the principals of equity will point the way to justice."

> and *Parish v. Maryland and Virginia Milk Producers Association*, 261 Md. 618, 277 A.2d 19, cert. denied, 404 U.S. 940 (1971 - Parish II)."

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footnote[3] (continued)

Complaint - Para. 77A. "Plaintiffs Parish allege that Defendant Lawyers, Messrs. Brune, Robertson, Shaffer and Michie, in conspiracy with all Defendants named herein, persistently refused to allege their clients (Parish, Wharff and Wenger) Trust Relationship (see paragraph 82 herein), with Defendant Association, failed to introduce evidence vital to the Defendant Association's (Trustee) solvency thereby aiding and furthering concealments of said evidence in an over-all conspiracy with the intent and purpose to defeat the due course of justice in the State of Maryland with purposeful intent to deny Plaintiffs, (citizens) under color of law, equal protection of the law. The Plaintiffs have been injured in person and property and deprived of exercising their rights as citizens of the United States by said lawyer defendants willful furtherance of the conspiracy."

Para. 82: 'Plaintiffs further allege that (in prior action), despite the Court's admonition, October 17, 1969, page 17 and 18 of transcript, "lines 23 to line 6 of page 18," *The Court's disposition of these matters* and the Court's ruling with respect to the Trust theory, which we in effect sustain at this stage of the proceedings, necessarily indicate at this stage and certainly prior to trial, *the necessity for the Complainants specifically to amend the Bill of Complaint in order to state a cause of action more clearly and amend their Prayers for Relief rather than rely upon a general Prayer for Relief that is set forth in the last prayer of the Complaint."*

The District Court further states (App. B-12):

> "A comparison of the first three Causes of Action in the Amended Complaint with the extensive and detailed Parish I and Parish II opinions shows that Plaintiffs are attempting to relitigate claims that were presented and decided adversely to them in the State proceedings, etc., etc. ."

Hasn't the Fourth Circuit Court of Appeals and the District Court below committed serious fraud:

1. In not taking cognizance of the obvious *false quotation* (false by omission) by the Maryland State Court of Appeals (Parish II) 277 Md. A.R.2d, page 48, of the opinion in (Parish I) 242 A.2d 539, 540 (7)*;

Page 48*: "(7) It is clear that officers and directors of a corporation stand in a sufficiently confidential relation to the corporation's stockholders to impose a duty upon them to reveal all facts material to the corporate transactions. *A.B.C. Packard, Inc. v. General Motors Corp.* 275 F.2d 63 (9th Cir.

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footnote[3] (continued)

Despite the above admonition, Defendants Brune and Shaffer filed an amendment on October 20, 1969, which only added a prayer. Parish, on the same day, filed an amendment which properly alleged the factors essential to the Trust. On November 5, 1969, a Joint Amendment by Brune, Shaffer and Parish was filed which adopted the allegations set forth in the Parish Amendment.

Para. 83: "Wherefore, Plaintiffs pray the Court to find the Defendant, Maryland and Virginia Milk Producers Association, Inc. to be a Trustee of an Express Trust."

1960). See 37 C.J.S. Fraud §16, page 248. *The confidential relation is even more apparent in a member corporation such as the Association.* The allegations of the complaint indicate that the members have not been properly informed by the officers and directors of the Association in regard to the various transactions set forth in the complaint and indeed, that the members have been deceived by the false annual reports. The members have been lulled into inaction and the Association has been damaged by failing to take action promptly to assert its rights so that possible defenses of limitations may have accrued and, in any event, it has been made more difficult to ascertain and have the facts necessary to establish the claims of the Association."

"The complaint sufficiently alleges facts which in themselves indicate a fraudulent concealment by the defendant auditor and active fraud by Hooper and Robinson as well as a fraudulent concealment by them and breach of fiduciary duty. *The concealed facts were material, properly relied on by the Association and its members,* and the Association's damage resulting therefrom has been alleged."

Quoting said court, from page 48 Md. 277 Atlantic Reporter 2d Series:

> "We think the Chancellor has stated quite accurately the standard against which the conduct of the directors must be measured. In *Parish*, Judge Barnes said, for the Court:

AT THIS POINT
OMITTING THE ABOVE QUOTED PARAGRAPH 7, thus falsely distoring the opinion of Judge Barnes.

"It is well established that courts generally will not interfere with the internal management of a corporation at the request of a minority stockholder or member. The conduct of the corporation's affairs are placed in the hands of the Board of Directors and if the majority of the board properly exercises its business judgment, the directors are not ordinarily liable. *This sound general rule, however, is subject to the important exception that* the directors will be held liable if they permit the funds of the corporation or the corporate property to be lost or wasted *by their gross or culpable negligence.*" 250 Md. at 74, 242 A.2d at 540. (Second emphasis added.)

Petitioners submit that the above distortion (by omission) of Judge Barnes opinion was intentional and indefensible;

C. 2. In not taking cognizance of the arrogance displayed by the Chancellor under the caption "Conclusions of Law," (page 47) and as quoted by the Court of Appeals on page 48, the following illegal, presumptuous inference that the Maryland Code, Article 23, §349* (App. 174) (Appendix to Appellants' Brief No. 78-1079), United States Court of Appeals, Fourth Circuit No. 78-1079, has any legal bearing upon a cooperative contracting with its members as a Trustee;

'(3) The appellants, on the other hand, insist that 'the Association is an express trustee of its members' milk and the proceeds thereof and that its directors and managing officers (having) shared the trust obligation of the Association with respect thereto*** are held to a higher standard than that of directors

of the ordinary business corporation, which is not a trustee handling other people's money and property.' In dealing with the question whether the appellants lacked standing to maintain this action, the chancellor thought there was a 'fiduciary relationship subsisting between the members and the Association as a result of the consignment to the Association of their produce.'* But, he said, 'the Cooperative Code provisions (Code 1966 Repl. Vol., Art. 23, §349) are cast in the mold of the corporation law of the State of Maryland.' He continued:

'*** We do not think that the simon-pure relationship that governs between cestui que trust and trustees are necessarily imported into the relationship that subsists between the Association and its members. See Scott on Trusts, Volume Five, Section 495, at page 3534.

(Note statement following re the Maryland Code.)

'In other words, we think there is a fiduciary relationship which gives the former members a right to maintain an action, but we, nevertheless, find and hold that the standard applicable to the directors upon the Bill of Complaint of the complainants in this case is the same standard as would apply generally with respect to the officers and directors of a stock corporation or a commercial organization which is a corporate entity. The standard we are all familiar with namely that *such officers and directors are liable for gross and culpable negligence.* (Emphasis added.)

"The familiary provisions, also, we think, of corporation law would obtain here with respect to the right or not of a court to intervene in the internal affairs of a corporate organization.' . . .";

*3. In not taking cognizance of the chancellor's above finding as to "The standard applicable to directors upon the Bill of Complaint," is directly negated by the Barnes paragraph (7) omitted?

"(App. 51) (Appendix to Appellants' Brief No. 78-1079) LAW OF CASE

79. Opinion by the Court of Appeals, 242 Atlantic Reporter 2d Series, 250 Md. 24, Frank P. Parish, et al. v. Maryland and Virginia Milk Producers Assoication, Inc., Md. 103 - May 22, 1968:

A. P. 521 (12) (e) "An illegal attempt by the Board of Directors through By-Law Amendments on March 30, 1966, to impose restrictions upon future derivative suits brought by members requiring: (1) an application to the Board of Directors and (if) authority for the suit is refused, and (2) a majority vote of all members attending an annual or special meeting - all contrary to the laws of the State of Maryland."

B. P. 539 (7) 'It is clear that officers and directors of a corporation stand in sufficiently confidential relation to the Corporation's stockholders to impose a duty upon them to reveal all facts material to the corporate transactions". *A.B.C.*

Packard, Inc. v. General Motors Corp., 275 F.2d 63 (9th Cir. 1960, see 37 C.J.S. Fraud, Sec. 16, page 248. THE CONFIDENTIAL RELATION IS EVEN MORE APPARENT IN A MEMBER CORPORATION SUCH AS THE ASSOCIATION." (emphasis supplied)

Note that (App. 174 to 187) (Appendix to Appellants' Brief No. 78-1079) the Annotated Code of Maryland does not prohibit a cooperative from contracting as a Trustee, but actually provide for such relationship. See App. 182, §364 and §372.

App. 182, §364:

CONTRACT WITH MEMBERS

Contracts between any Association and its members, whereby such members agree to sell . . . their products . . . through . . . the Association, and . . .

App. 185, §372:

OPERATION ON NONPROFIT BASIS

(a) Agreement with members. - - Any Association . . . may operate upon a non-profit basis by contracting to pay the members for the products sold by said members . . . through the Association, (*consignment*) the resale price minus a uniform charge to cover expenses involved in the handling of said products; . . .;

C. 3. In not taking cognizance of the fraud re new By-Laws, by the chancellor, Messrs. Brune, Shaffer and Michie.

Record of change in By-Laws (paragraph 78 of Complaint) (Appendix to Appellants' Brief No. 78-1079), Brune and Shaffer stated in their Brief filed in the Court of Appeals of Maryland, September Term, in behalf of Parish, et al, September Term, 1967, as did Parish in their brief.

"An illegal attempt by the Board of Directors through amendments March 30, 1966 to impose restrictions upon future derivative suits brought by members attending annual or special meeting - all contrary to the Laws of Maryland."

May 27, 1968

The Court of Appeals ruled (242 A.R. 2d 521 (12e): "An illegal attempt by the Board of Directors through By-Law Amendment on March 30, 1966, to impose restrictions upon future derivative suits brought by members requiring (1) an application to the Board of Directors and (if) authority for the suit is refused and (2) a majority vote of all members attending - ALL CONTRARY TO THE LAWS OF MARYLAND."

November 6, 1969 (Exhibit T to Amended Complaint)
Hearing before John P. Moore, Judge.

These same By-Laws were offerred in evidence by Mr. Merrigan.

"(The Court) Is there any objection?

"(Mr. Shaffer) No objection.

"Brune also present (silent)

"(The Court) They will be received" (see pp. 74, 75 of Exhibit T of the amended complaint) (Appellants' Appendix to Brief No. 78-1079).

On December 16, 1969 (page 39, paragraph 78 - App. 50), "The Circuit Court for Montgomery County, Maryland, page 10, line 4, the Court stated: 'At the time, in consideration of the Demurrer which had been sustained by another member of the Court, the Court of Appeals found that it could not be held as a matter of law that the Plaintiffs lacked standing to sue, particularly on the basis of the By-Law provisions which are quoted in the Court's opinion. *"It has come to light, of course, in the proceedings here that the By-Laws were changed* by an action of the members of the Association in 1965 . . . *At the time of the consideration of the demurrer, the Court of Appeals did not have before it these documents with respect to standing . . . The Court's conclusion*, after great consideration of all matters involved, is that with respect to this, *the Complainants are bound by the new By-Laws which were adopted and the full text of which appear in the record in this case."* (Emphasis supplied.)

(ALL FALSE AS ABOVE NOTED.)

Note illegal By-Laws also in Brune's Third Amended Complaint (p. 32 - Joint Record Extract - Appendix to Appellant's Brief No. 78-1079, also p. 66, paragraphs E and F.)

In light of the District Court's characterization of the First Cause of Action, "A plethora of allegations about the legal relationship." (Appendix B, Page No. 10 herein)

Petitioners quote important statements of facts and allegations from their Amended Complaint cited in full in Appendix pp. 20-23 (Appendix to Appellants' Brief No. 78-1079).

FIRST CAUSE OF ACTION

"20. In November, 1972, Mrs. F. P. Parish (Mrs. Theodore Fisher Parish, Plaintiff), signed an individual contract (Standard Marketing Agreement) with the Defendant, Maryland and Virginia Milk Producers Association, Inc., dated November 18, 1942 (Exhibit D) (Appendix to Appellants' Brief No. 78-1079), presented herewith and prayed to be made a part hereof.

"21. On October 9, 1961, the Defendant Association signed a new contract with Frank P. Parish and Theodore Fisher Parish, jointly (Association's then Standard Marketing Agreement), (Exhibit E) (Appendix to Appellants' Brief No. 78-1079), presented herewith and prayed to be made a part hereof. (All assets, farm and dairy included, are and have been jointly owned; they having been paid for by funds from joint bank account.)

"22. Plaintiffs allege that they complied with their obligations under the above cited Parish contracts, particularly, all milk produced on their farms in the years 1943 to 1966 was consigned to and accepted by the Defendant Association pursuant to paragraph 1 of each contract;

"23. The Defendant Association accepted, on consignment, all Plaintiffs' and other members' milk, withholding monies from the sale of said milk pursuant to the manifestation of intention expressed in its Articles of Incorporation and said signed contracts, which impose a duty upon the

Association to deal with all such milk and money in the sole interest of its members and the Court in enforcing the duty is giving effect to that intention;

"24. By virtue of the Defendant Association's Board of Directors Resolution July 9, 1954, the Board of Directors confirmed and acknowledged its duty and obligation to account to the members for services rendered and all monies received and disbursed by The Association. Also, page 6 of Resolution provides for use of facsimile signatures on checks;

"25. The Defendant Association has possession, control and legal title to money, personal and real property, also claims against others, all acquired by withholding and investing net proceeds from the sale of members' milk (withholdings in excess of contract provisions, by Director's Resolution November 1, 1964), which property and claims are held for the benefit of the members, including Petitioners, Parish, IN A SHARE UNKNOWN TO THEM. (All of which comprise the Trust Res.)

"26. Plaintiffs allege that: upon the acceptance of Plaintiffs' and any other members milk pursuant to the manifestations of intention, above alleged and set forth, the Defendant Association became a Trustee of an Express Trust which has not been terminated.

"26A. Plaintiffs allege that the Defendant Association (Trustee), has never claimed to be the owner of the legal title adversely.

Defendants do not deny the factors set forth in Complaint which constitute an Express Trust: (PLAINTIFFS FIRST CAUSE OF ACTION - pages 9 - 12 herein).

Plaintiffs allege that the Trust question has *not* been adjudicated; that the District Court's ruling December 16, 1969 and its denial of Plaintiffs Petition for a Rehearing deprived Plaintiffs of a fair trial (paragraph 81 - 5 herein, page 42.)

TRUST NOT TERMINATED

"27. Plaintiffs have received two letters dated September 14, 1973 and September 14, 1974, each enclosing checks payable to Plaintiffs for money due them for milk Plaintiffs consigned to the Association during the years 1959, 1962 and 1963. There is also the contingent liability for further monies which may be found due and payable;

"27A. Said Defendant, Maryland and Virginia Milk Producers Association, Inc., by a letter to Plaintiffs, Parish, dated September 12, 1975 and enclosed with said letter its' Check No. 712744236 dated September 15, 1975, drawn on National Savings & Trust Co., Washington, D.C. payable to said Plaintiffs, in the amount of $23.27.

Said letter stated "During the year 1974, the Association received $24,719. from the bank for Cooperatives as a result of operations in the years 1963 and 1964.

Our records indicate that you shipped milk in 1963 and 1964 and are therefore entitled to participate in the patronage allocation of these funds on your production in those years . . since the Association received the full amount in cash. We are making the *full distribution* to Producers in cash. The above check represents your pro rata share."

Plaintiffs allege that the above cited letter and check clearly indicate that the Defendant Association, by sending

its' check and letter, recognizes their continuing obligation, as Trustee, to account for Income and Disbursements. The Defendant Association, by sending said letter and check, reaffirms the Association's obligation to account for its Income and Disbursements.

"28. Plaintiffs allege that: an actual and a justiciable contoversy exists between the Complainants and the Defendant Association, on a number of issues, one of which is the legal relationship between the parties. The determination of legal relationship is essential, it being a basic factor bearing upon an adjudication of the many issues before the Court in four additional causes of action contained therein. The Defendant Association and its' Directors have denied the Trust Relation in answer to Complaint filed in prior action.

"29. Wherefore, Plaintiffs pray for *declaratory judgment* that at the point in time (1942), when the Defendant Association accepted Plaintiffs' milk, (the Trust Res), the legal relationship of the Defendant Association to Plaintiffs became that of an Express Trust and Beneficiaries which has not been terminated."

In support of Plaintiffs allegations that the Defendant Association is a Trustee of an Express Trust as set forth in the First Cause of Action (paragraphs 20-29 of Amended Complaint); March 9, 1976: (Appendix to Appellants' Brief No. 78-1079)

"1. Scott on Trusts, §462.1:

> " . . . An express trust is a fiduciary relationship with respect to property, *arising as a result of a manifestation of an intention to create it and sub-*

jecting the person in whom the title is vested to equitable duties to deal with it for the benefit of others . . ."

The manifestation of an intention of this instance, being the intent expressed in Certificates of Incorporation, Exhibits A and C*, and the terms set forth in the contracts, (Exhibits D and E to the Amended Bill of Complaint).

Title to Property (Milk)
and Ownership

In establishing the trust principal, the Complainants direct the Court's attention to a judicial conclusion enunciated in previous litigation involving the Association of at least one of the essential elements necessary to the creation of a trust relationship between it and its members, *Cf. Maryland and Virginia Milk Producers Association v. District of Columbia*, 119 F.2d 787, 792 (D.C. Circ., 1941), viz, *that title to the members' milk passed to the Association upon delivery to the latter*, and upon case law relating to the subject of Cooperative Associations.

In the case just cited the Association, at page 792, we find:

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* ALL EXHIBITS CITED HEREIN ARE CONTAINED IN APPENDIX TO APPELLANTS' BRIEF NO. 78-1079.

"It has been repeatedly held, in Maryland and elsewhere, that a cooperative corporation is an entity distinct from its members. We see no more reason for asserting that all the individual shareholders of a stock corporation own its accounts. Even when cooperative association's contracts with its milk - producing members have been phrased clearly in terms of agency, *it has been conceded that title to the milk passed to the association, and held that the association,* and not the member, was the actual seller of the milk which the distributors bought." (emphasis supplied)

Quoting Scott on Trusts, Volume 1, page 36, §2.2; line 5, Third Edition, 1967 (no change in 1976):

" In the case of an express trust, however, the duty to deal with the property arises as a result of a manifestation of an intention to impose such a duty, and the Court in enforcing the duty is giving effect to that intention."

"2. Quoting M.L.E. §20:

"Subject to the general rules of an *express trust*, where a person has or accepts possession of personal property, with the express or implied understanding that he is not to hold it as his own absolute property, but is to hold and apply it for certain specified purposes or for the benefit of certain specified persons, a valid and enforceable trust exists." *Hayward v. Campbell*, 1938, 199 A. 530, 174 Md. 540.

Ruhe v. Ruhe, 113 Md. 596:

> "When an absolute transfer of property is made to a person upon the faith of his promise to do certain things, or to hold the property for the benefit of the grantor, a valid trust is thereby created. THIS TRUST IS ALSO ENFORCEABLE AGAINST A THIRD PARTY WHO TAKES THE PROPERTY BY WAY OF GIFT, ALTHOUGH IGNORANT OF THE TRUST." (emphasis supplied)

"POINTS AND AUTHORITIES IN SUPPORT OF PRAYERS FOR DECLARATORY JUDGMENTS AND INJUNCTIVE RELIEF SET FORTH IN FIRST CAUSE OF ACTION, PARAGRAPHS 28 AND 29 (Pages 11-12) AND IN THE THIRD CAUSE OF ACTION, PARAGRAPHS B, 69 and 69A (Page 32)

"4. Declaratory Judgments and Injunctive Relief (See Rule 57, Federal Rules of Civil Procedure.)

A. The Court is empowered to determine any question of construction or validity arising under a written contract and declare the rights, status, or other legal relations thereunder of the parties thereto.
McCrory Stores Corp. v. S.M. Braunstein, Inc. 134 A. 752, 102 N.J. Law 592.
(Also Civil Practice Act, §473.)

B. The Federal Declaratory Judgment Act, 28 U.S.C.A. Section 2201, et seq., confers jurisdiction to render declaratory judgments

on any Court of the United States;
Branson v. Harris, Mun. App. 100 A.2d 38.

C. A complaint sufficiently shows cause of action for a declaratory judgment where it states the substance of a bonafide justiciable controversy which should be determined.

> *Henry v. White*, 60 So. 2d 149, 257 Ala. 549; *Carter Oil Co. v. Blair*, 57 So. 2d 64, 256 Ala. 650; *Vinson v. Vinson*, 54 So. 2d 509, 256 Ala 259; *Hill v. Wright*, 20 A.2d 388, 128 Conn. 12; *Northumberland County v. Independent Miners, Breakmen, and Truckers Assn. of Shamokin*, Com Pl., 24 Northumberland Leg. J. 134.

A review of the chancellor's record of unjudicial conduct re the question of Trust Relationship, by the Court and counsel, is essential.

Paragraph 71 of Amended Complaint (Appendix to Appellants' Brief No. 78-1079), "Complaint of necessity, includes matter of prior litigation concerning Plaintiffs' attorneys willful failure to plead Trust Relationship and their refusal to follow clients instructions. See Exhibit O - Transcript of Court Hearing of February 14, 1969, presented herewith and prayed to be made a part hereof.

Plaintiff allege that the Court displayed hostility during hearing February 14, 1969:

"In The Circuit Court for Montgomery County, Maryland
Sitting as a Court of Equity

Frank P. Parish, et al
Complainants,

vs. Equity No. 29524

Maryland & Virginia Milk
Producers Association, Inc.,
et al,
Defendants.

Rockville, Maryland
Friday, February 14, 1969

The above entitled matter came on for hearing, at 2:00 o'clock p.m.

Before:

The Honorable John P. Moore, Judge.

****

(T. 2) (The Court) I merely identified the matter that is before us, being your petition for a rehearing.

(Mr. Parish) Yes. Do you want me to proceed?

(Court) Before you do: the record will indicate that you, some time ago at the last hearing in open court, were allowed a period of some 30 days within which to engage counsel. As we recall the record in this case, at or near the completion of that period you at that time petitioned the court for a re-hearing.

(Mr. Parish) Right.

****

(T. 9) (The Court) Will you keep your voice up, please.

(Mr. Parish) I am sorry. I have been seeking counsel; and Mr. Michie offered to serve as counsel and submitted first a draft of amendment which was a fourth amended bill of complaint. The only change between that and the third amended bill of complaint was the addition of a prayer which included allegations.

Then I received another one of similar character with places for all signatures, mine on top as senior counsel because I would not go along with the other, his representing me, and it likewise added only a prayer to the bill of complaint. It did not follow the Court's advice about an amendment to the bill of complaint.

In my best understanding of the law, a prayer is not a part of the allegation part of the bill of complaint, and I can not go along with that under those circumstances.

I have seen two other counsel besides. Each refuses to allow his client any authority whatsoever as to the points, the basic points, to be covered by the litigation.

There are endeavors which I impose upon any counsel we will employ: the duty to proceed with the establishing of the trust relationship, Your Honor. It is basic, and I believe the client has that right.

****

(T. 14) (Mr. Parish) . . . Briefly, that exposes us all to a recognition that pretrial discovery is not a perfunctory thing. The investigation should be completed by those who started it and based on the trust relationship. That duty and obligation of a Trustee (T. 15) to keep full records, to inform the beneficiaries voluntarily, becomes a dominant factor in this situation.

(The Court) Are you suggesting, Mr. Parish, that you have not been able to engage counsel because counsel do not agree with you with respect to these matters?

(Mr. Parish) No. They do agree with me. I have Mr. Brune's agreement in writing. He agrees that the trust relationship exists. But he will not pursue it in the manner that I believe is legal.

In other words, as the Court understood, there was a deficiency insofar as being able to establish the trust relationship by reason of the allegations not being adequate. (See Points and Authority pp. 5 and 6 of Appellants Brief, and paragraph 82 of Complaint pp. 4 and 5 herein. Mr. Brune has attempted and insisted to cover this by an additional prayer. I think I have the right to express my disagreement, to represent myself in that disagreement . . .

Thank you.

(The Court) Can you state to the Court, Mr. Parish, the reason why you have not engaged counsel?

(Mr. Parish) No. It is not. I am pointing out that the time required is so - -

(The Court) No. The Court - -

(Mr. Parish) - - out of reason with the request of (T. 16) the Court at the preliminary hearing for early trial date; and accepting December 15, that is evidence to my mind of actual - - well, I hate to put it in words - - but certainly violation of the trust of a client.

(The Court) Can you give the Court any reason why you have not engaged counsel during the 30-day period that was specified?

(Mr. Parish) I have not engaged counsel - - number one, I have not engaged Mr. Michie again because he will not present a proper amendment to the bill of complaint. Two other lawyers that I have encountered who were willing to accept the case will not consider the client's opinions at all.

****

(T. 19) (Mr. Parish) May I answer that, Your Honor?

Going back to Mr. Michie: he did offer to represent me, on these terms; that is, by presenting these drafts. And they are not acceptable to me.

As to Mr. Wharff: On December 28 he wrote to Mr. Wenger, the other plaintiff: "I have attended the hearing

on December 17, and to my mind the most important aspect is the lawyers for the complainants are still pursuing the premise that our suit is a stockholders' derivative action. On the other hand, I'm convinced the legal relationship between the association and the members is that of a trust, the basic difference which is important to us being, one, under a stockholders' derivative action the court rules on what you find is wrong; while, two, under the trust the association trustee is legally obligated to disclose voluntarily to the beneficiaries, members, everything that is important for them to know to protect their interests.

"Furthermore, we have stopped shipping milk, and are still entitled to an accounting by the association for the milk that has been held in trust for me. Trying our case under the trust concept not only simplifies it truly but establishes the trust concept for the future.

"I wrote to Mr. Herbert Brune on June 24 and again on November 24, copies attached, respecting the trust. He has not responded to either with respect to the trust relationship.

(T. 20) "I'm advised that the new intervenors, clients of Mr. Michie, having expressly directed their counsel that the trust concept is a most important part of this suit. *Mr. Parish, now representing himself, has filed a motion for an amendment to the third amended bill of complaint, alleging a trust concept, which we all thought was already properly alleged.* (Emphasis supplied)

"I think we should all go on record insisting on the trust concept being pleaded in our behalf. If counsel refuse to comply, we should then ask for the counsel's withdrawal."

On November 24th, the letter attached to this: "Dear Mr. Brune"- -

(The Court) We think it is not necessary, Mr. Parish, to go into these communications.

(Mr. Parish) I have covered my point as to whether these things are happening. It is not personal.

(Mr. Brune) If Your Honor please, if there is any way that I can assist, since my name has been brought into this matter rather direclty, I would be happy to attempt to do so.

I may say this, preliminarily: this situation is very embarrassing to me personally but it could not be as embarrassing as the situation that Mr. Shaffer and I found ourselves in when, after filing a brief in the Court of Appeals, we were notified that we were discharged by Mr. Parish and he was going to argue his own case. As a matter of fact, (T. 21) he did argue his own case. He made a good presentation of his feeling that the trust concept is extemely important in the case, and the Court of Appeals in its opinion I think decided declaration in a derivative suit.

But the court was very careful in the opinion to bring out what was pleaded in the complaint as it then stood with respect to the trust concept. In fact the court - - and I think I have a copy of the opinion here in my briefcase - - quoted as a statement of the information on which the court was determining the validity of the bill of complaint, the court quoted the statement; "The association has the character of an incorporated trust." Meaning, and going on to explain:

"that it is a trustee for the members of the proceeds of the milk and milk products sales made by the association."

The reason why we as counsel have been very reluctant to amend the allegations of the bill of complaint is simply the practical one that we do not want to delay the trial, and we do not think it is necessary. The amendment which we - - after considerable discussion between the relative counsel - - two of the firms were willing to make some amendment, one was not.

The two firms that were willing to make an amendment were willing only to amend by specifically asking for relief based on the theory that this is, the association is a (T. 22) trust, and stating in the prayer a request for a declaration of, I think, five different conclusions that result from the fact that this association is actually a trust.

As I said, the reason why counsel have been unwilling up to this point to agree to amend the actual allegations of the complaint was simply a practical one; no difference of opinion whatever with Mr. Parish as to the fact that this is a trust and should be recognized to be a trust.

Further, we feel that the Court of Appeals in its opinion has recognized that this association, different from an ordinary stock corporation, is operated as a trust for its members. And we think that the only change that has to be made, and we are very willing to make that change, is to put in whatever is necessary to get the utmost benefit out of that point by asking the Court to find in effect almost as a declaratory part of the decree that this association is a trust and "that the following conclusions follow from that."

Now, I do not wish to tell the Court, nor do I wish Mr. Parish to have the impression, that counsel are unwilling - - that present counsel are unwilling - - to go along with whatever is necessary and hopefully what Mr. Parish wants, in an effort to try to get the utmost benefit out of the fact that this is unquestionably a trust.

I think it is quite possible that the counsel, the present counsel - - since we are going to have considerable (T. 23) delay anyway, so our practical reason does not seem to have much validity - - I think it is very possible that counsel will agree to go along to making an amendment to the complaint which will specifically and in more detail than has already been alleged in the third amended complaint specifically state that this is a trust.

I go back to the fact, and the reason I am trying to think of some means of working this situation out particularly is that after the original complaint was filed in this case in 1965, Mr. Parish became dissatisfied with counsel and sent various communications to the then presiding Judge, and those communications made it clear that he and his counsel were not working together.

Some of the allegations about the conduct of the counsel were so damaging to counsel's reputation that counsel determined they could not represent Mr. Parish. As a result of that conflict, at an early stage of the case beginning in the summer of 1965, the whole case was delayed for more than a year. And I do not want to see that happen again.

If there is anything that we can reasonably do to accomodate Mr. Parish's desire, I am going to try to get my co-counsel to agree with it. Up to the present time, Mr. Michie and our firm have been in complete agreement as to what can and should be done; I think it is quite possible that we can get together with Mr. Parish and solve this problem in that (T. 24) way.

I would, however, say this: I have no particular reason either to favor or disfavor Mr. Parish's handling his own case. I have examined some of the authorities that have been cited. It seems to me that there are three Maryland cases in which the Court of Appeals has made it clear that an individual party is entitled to handle his case in propria persona. I do not think there is anything in any of the other cases that have been cited that would detract from that general principle or would eliminate it from a case which is brought as a derivative suit, which this is.

Therefore, I think that Mr. Parish - - I must say I think that Mr. Parish has the right to represent himself. Nevertheless, I am most anxious to get these matters worked out so we can get on with the trial, and if it is at all possible for an agreement to be reached between Mr. Parish which would satisfy him to continue with Mr. Michie as his counsel, I will be happy to do everything I can to help to work that out.

(The Court) Mr. Parish?

(Mr. Parish) Your Honor, there are two or three points, very quickly.

Under the concept of just adding a prayer to cover this trust problem - - and which I believe would be sustained, but

the decision would come last and the benefit of the trust (T. 25) decision or determination needs to come first in order to have the use, the force of it during our pre-trial discovery - -

(The Court) Mr. Parish, you have just heard what seems to the Court a very reasoned and very reasonable and very cooperative suggestion - -

(Mr. Parish) I will come to that, Your Honor.

(The Court) - - made by counsel with reference to this matter. Would you address yourself to that?

(Mr. Parish) I am not ignoring it at all, but I will just take it in the order in which the things came.

He mentioned the Court of Appeals and my representing myself. For at least a year before the date that Mr. Brune suggested and we got so far apart, I brought the trust relationship up for consideration; that, and not getting the Dougan report despite the fact that we had a ruling by Judge Shook against the protective order of denying the protective order for depositions, July 20, 1965, we had no action whatsoever. That is why we parted company. That is what started all the trouble.

Mr. Shaffer undertook to represent me knowing all these facts, and still did the same thing. Now Mr. Brune mentions all counsel are in agreement.

On January 8, Mr. Shaffer writes Mr. Brune with respect to this particular type of draft covered by a prayer, and I quote paragraph two, page two. Mr. Shaffer said: "I do (T. 26) not

think that merely amending the prayers for relief of the third amended bill of complaint by inserting a new paragraph 4A will accomplish any worthwhile objective, much less that Mr. Parish has in mind."

I would welcome this ccoperation if it can be as Mr. Brune suggests now: an amendment to the bill of complaint, as Your Honor also suggested to Mr. Michie. I would be very delighted. We are on our road. *And please don't be too impressed by talks of delay, when we have had five years, and since July 20, 1965,* we had the opportunity to take depositions.

****

(T. 27) (The Court) . . . So it seems inevitable that the Court must conclude here that Mr. and Mrs. Parish, therefore, do have the right to represent themselves.

****

(T. 29) (The Court) . . . We want to point out that the Court will insist that the rules of court, both the Maryland rules and the local rules, be strictly complied with. If you do not engage counsel, Mr. and Mrs. Parish, the Court does not propose to lend its efforts in your direction as counsel in your behalf; nor to be subjected to requests for conferences in chambers with reference to the manner or the method by which certain procedures may be effected under the rules.

(T. 30) You will be limited to your own resources and be required to conform - - this we emphasize - - to conform in all respects to the rules of procedure and the rules of law

generally applicable in a case of this kind. The Court will not countenance any departure from these rules, and even if there should not be an objection - - something which is probably contrary to fact - - we would, upon our own motion, not receive any papers which do not conform to the rules; and will so instruct the Clerk of the Court at the time that any papers may be submitted for filing, if they do not conform to the Maryland Rules of Procedure and to the local court rules for the Circuit Court for Montgomery County, they will not be accepted for filing."

This is contrary to precedent quoted in our Brief, pp. 5 and 6, and hostile. Also, note pages 4 and 5 herein, paragraph 82, the Court itself stated the necessity to amend for the same reasons put forth herein.

SECOND CAUSE OF ACTION

The second cause of action stated in the Amended Complaint sounds essentially in fraud. It essentially claims that the Appellees, Maryland and Virginia Milk Producers Association, Inc., together with its Directors, Officers and Trustees, conspired to conceal with the aid of auditors and counsel, and did conceal from its members (cestui que trust) many major material facts, alleged in detail in paragraphs 31 through 55 of Amended Complaint (Appendix pp. 23-37). (Appendix to Appellants' Brief No. 78-1079).

Evidence of the fact that Appellees were fully informed is disclosed by paragraphs 41 thru 48 of Amended Complaint.

THIRD CAUSE OF ACTION

The third cause of action sounds in the nature of an equitable action for an accounting, based on the existence of a trust relationship and allegations that there had not been sufficient account of proper accounting in the past.

Quoting the Federal District Court's letter Memorandum Order. page 3 (Appendix B - page 13.)

" . . . A comparison of the first three causes of action in the Amended Complaint with the extensive and detailed Parish I and Parish II opinions shows that plaintiffs are attempting to relitigate claims that were presented and decided adversely to them in the state proceedings . . ."

Petitioners repeat "Statement of the Case" in their brief filed with The Fourth Circuit Court of Appeals:

Plaintiffs Amended Complaint (Docket No. 94) (Appendix 2) is an independent action based upon fraud extrinsic and also fraud, both extrinsic and intrinsic; an action to impeach the judgment of the state court, in prior action, on the grounds that said judgment is blatantly unconscionable and based upon totally unfounded conclusions.[4] See paragraph 81, Appendix 2 (Appendix to Appellants' Brief No. 78-1079); subparagraphs thereto 1 thru 5.

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[4] *Kauffman, et al v. McLaughlin*, 114 P.2d 929
SYLLABUS BY THE COURT

2. "A person sustaining the relation of trustee to another owes such other person the duty of making a full disclosure of

Said amended complaint alleges that "the ruling by the State District Court is without any legal significance and a complete nullity with a purpose to deprive plaintiff of his property without due process of law" (Appendix page 16) (Appendix to Appellants' Brief No. 78-1079). The Circuit Court, in said prior action, having denied petition for a rehearing, the Court of Appeals, of Maryland having denied

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footnote[4] (continued)

all matters appertaining to the trust. Neglect to do so to such other's injury, knowing or having good reason to believe that silence will so result, is a fraudulent act, and failure of the trustee in that regard persisted in, in a judicial proceeding, to the prejudice of such other and advantage to himself, may be regarded as fraud extrinsic, as well as fraud intrinsic, and may be treated as fraud extrinsic practiced upon the Court."

Laun, et al v. Kipp, 155 Wis. 347, 145 N.W. 183-5 ALR 655-675

The fraudulent concealment or omission of facts, by a fiduciary, the revealing of which would have caused the entry of the judgment in favor of the cestui que trust, is fraud which will induce a court of equity, in an independent suit, to relieve against a judgment or order that is unjust to the cestui que trust. *Smith v. Smith*, (1914) 210 Fed. 947, affirmed in (1915) 139 C.C.A. 465, 224 Fed. 1; *Sohler v. Sohler*, (1920) 135 Cal. 323, 87 Am. St. Rep. 98, 67 Pac. 282; *Campbell - Kawannanakoa v. Campbell* (1909) 152 Cal. 201, 92 Pac. 184, *Burnett v. Milnes* (1897) 148 Ind. 230, 46 N.E. 464; *Bowsman v. Anderson* (1912) 62 Or. 431, 123 Pac. 1092; rehearsing denied in (1912) 62 Or. 444, 125 Pac. 270; *Schneider v. Sellers* (1900) 25 Tex. Civ. App. 226, 61 S.W. 541; the reported case *(Laun v. Kipp*, ante, 655).

Joint Motion for Reargument - Exhibits Z-2 and Z-3 and excerpts from Ruling (Exhibit Z-4);

"Plaintiffs seek the right to submit proof that the Courts stated basis for finding 'that the Simon-pure relationship that governs between cestui que trust and trustee are not necessarily imported into the relationship that subsists between the association and its members,' is totally without any legal significance and a complete nullity." (Appendix 2, page 17) (Appendix to Appellants' Brief No. 78-1079).

The Complaint presents five causes of action, all joined together as one action by paragraphs 30, 56, 60 and 70, imposing upon all defendants the standard of care and duty required of a Trustee (First Cause of Action).[4A]

Court failed to render Declaratory Judgment.

[4A] *Atlanta Trust Co. v. National Bondholders Corp.* 4 S.E. 20 644

"One who aids and assists a trustee in misapplying trust funds, with knowledge of his misconduct, is directly accountable to the person injured, etc."

First Trust Co. of Lincoln v. Carlson, et al, 261 N.E. 333

4. Where the trustee has practiced concealment, evasion, or misrepresentation depriving cestui trust of material information relative to the subject matter of trust to his injury and those participating in wrong, may be required to respond in damages, etc."

Accordingly, Plaintiffs submit that the Federal District Court's finding, "Whether the analytical base is res judicata, full faith and credit, or outright lack of jurisdiction, it is clear that the Plaintiffs first Three Causes of Action must be dismissed." DO NOT APPLY TO THIS ACTION.

There is no question that "The heart of res judicata doctrine is the policy that all litigation must sometime come to an end . ."

BUT:

Isn't this a two edged sword? Declaratory Judgment should have been rendered, thus putting an end to controversy over the obvious fact that the relationship is that of an express trust (the focal point in this action).

That res judicata does not apply in this case regardless of the fraud and independent action, is presented in Appellants' Brief to the United States Court of Appeals for the Fourth Circuit, page 8, Argument I.

Petitioners submit that the District Court failed to respond to Appellants' citations re the Fourth Cause of Action in their brief, page 12, quoted below:

". . .

"5 §702 GOVERNMENT ORGANIZATION

Page 180:

"Jurisdiction to review exlusionary rulings may be sustained, even absent significant injury, where agency's ruling

is so flagrantly wrong* and demonstrably critical as to make it apparent that the agency is not merely courting the possibility of reversal but is running into the certainty of it if the ultimate decision should be against the proponent of the evidence. *Conway Corp. v. Federal Power Commission*, 1975, 510 F.2d 1264, 187 U.S. App. D.C. 43, certiorari granted 96 S. Ct. 355, 423 U.S. 945, 46 L. Ed. 2d 276."

* See Page 23 of Complaint and Exhibit X, Appendices A and B, also 1 thru 10 attached hereto.

Page 181:

"Although injury to plaintiff's economic well-being constitutes injury in fact in determining whether plaintiff has standing to challenge administrative action, other types of injury are sufficient to meet requirements of test, including injury to plaintiff's aesthetic or environmental well-being. *McDowell v. Schlesinger*, D.C. Mo. 1975, 424 F. Supp. 221.

Person adversely affected by administrative action is presumptively entitled to judicial review of its correctness. *Phillips v. Dawson*, D.C. Ky. 1975, 393 F. Supp. 360." (emphasis supplied)

Page 182:

"Right to review of agency action is usually restricted to persons whom agency regulates or affects adversely. *Robinson v. Pottinger*, D.C. Ala. 1974, 376 F. Supp. 615.

This chapter in no way expands the concept of standing to sue; plaintiffs are still required to show that they are

aggrieved by an agency action before they can obtain judicial review. *Evans v. Lynn*, D.C. N.Y. 1974, 376 F. Supp. 327."

. . .

"Economic injury gives a person standing to seek judicial review of administrative agency action but once review is properly invoked *that person may argue the public interest in support of his claim that an agency has failed to comply with its statutory mandate. Lee v. Resor,* D.C. Fla. 1972, 348 F. Supp. 389."

Federal Defendant's Motion to Dismiss (Docket No. 99) fails to note the 1973 Amendment.

"7 §1446. Ch. 35, page 444: (See page 6 of Motion)

1973 Amendment. Subsec. (c) Pub. L., 93-86 inserted "of pure and wholesome milk *to meet current needs, reflect changes in the cost of production, and assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs."* following "necessary in order to assure an adequate supply . . ." (emphasis supplied)

"15 §714B -

(9) Debarment - Generally

Commodity Credit Corporation *has inherent power to terminate business relations with irresponsible, defaulting, or dishonest contractors as necessary incidental to effective administration of statutory scheme. Gonzles v. Freeman,* 1964, 334 F.2d 570, 118 18 App. D.C. 180. (emphasis supplied)

"13 JURISDICTION

District courts of United States have exclusive jurisdiction of all suits brought by or against Commodity Credit Corporation and Federal Courts have exclusive jurisdiction over causes of action which corporation has right to prosecute. *U.S. v. McDonald Grain & Seed Co.*, D.C.N.D. 1957 F. Supp. 329. Rev. on other grounds, 261 F.2d 539."

Re the District Court's statement, page 7, Memorandum and Order: "Finally, Plaintiffs' conclusory allegations, at best, concern only a private conspiracy which does not fall with the ambit of Section 1985 - - defendants Motion to Dismiss the Fifth Cause of Action will be granted."

Petitioners submit, as noted in their brief, page 15, " . . . that due to the vast number of individuals involved and the fact that direct dealings with Government funds are involved, this is not a private conspiracy, but rather takes the nature of a sufficiently large conspiracy as to the public in nature. Bearing upon this point and the fact that the issues and parties in this action are not the same as those in the prior action, reference is here made to Appendix 2, (Appendix to Appellants' Brief No. 78-1079), paragraphs 84, 86 and 86A) and Exhibit R therein (Appendix 8A), Appendix 9 being a photocopy of the summary contained in the United States Senate Subcommittees' staff study cited in Exhibit L-1 and paragraph 88A of Amended Complaint (Docket No. 94, Appendix 2, page 46). This bears heavily on the point of fraud in accounting (conspiracy) national in scope and cites Appellee (Price Waterhouse & Co.) (see paragraphs 49 and 50 of Appendix 2; also, paragraphs 69B and 69C).

Appendix 9 of Appendix to Appellants' Brief No. 78-1079 in the United States Court of Appeals for the Fourth Circuit is submitted pursuant to Federal Rule 803-14, 18 and 24.

In reply to the District Court's citation on *Griffin v. Breckenridge* (page 6 of Memorandum and Order) 403 U.S.A. 102, "A close reading of the Complaint shows that it is totally devoid of any hint or suggestion of a class based discriminatory intent, e.g., that persons in a class different than Plaintiffs received." (Appendix 2 herein)

Plaintiffs submit that the class distinction here is obviously the legal establishment versus the layman (members).

REASONS FOR GRANTING THE WRIT

To ignore the time honored Judicial determinations as to the basic legal grounds upon which Trustee's relationships and duties are created, is to abandon all recognition of moral and intellectual integrity required by the judiciary and make a mockery of the maxims "fraud vitiates everything and there is no wrong without a remedy in equity."

Judge Cardozo, speaking for the New York Court of Appeals in an often quoted passage, has said:

> "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this, there has developed a tradition

> that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitoned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that troddenby the crowd. It will not consciously be lowered by any judgment of this Court."

Scott on Trusts, Section 170.25, pages 1387-1388.

In addition, it is generally accepted that government agencies may not and should not participate in fraud against any class of individual, let alone the public as a whole. Accordingly, this Court is called upon to decide whether the fraud alleged goes unbridled, or whether the same is redressed in the Courts.

CONCLUSION

Petitioners submit that this case presents a serious misapplication of principles of law and accepted concepts of justice which require a hearing that allegations made may be fully explored.

Respectfully submitted,

FRANK P. PARISH, Pro Se,
THEODORE FISHER PARISH,
Pro Se,
518 E. Baltimore Street
Taneytown, Maryland 21787
Petitioners, Pro Se

February 11, 1979

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 78-1079

Frank P. Parish, Mrs. Theodore Fisher Parish,
Appellant,

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.; ROBERT M. GOLDMAN, and J. ROBERT SHERWOOD, (as Trustees); WILLIAM B. HOOPER; WILLIAM J. HUGHES, JR.; EARL H. BUTZ, Secretary of Agriculture; COMMODITY CREDIT CORPORATION; EDWARD L. MERRIGAN; HERBERT M. BRUNE; HARRISON M. ROBERTSON, JR.; CHARLES NORMAN SHAFFER; JAMES E. CLICK, Secretary & Treasurer, Maryland and Virginia Milk Producers Association, Inc.; THOMAS J. MICHIE; WAYNE KENDRICK & COMPANY; ERNEST C. CLIFFORD; PRICE WATERHOUSE & CO.; DIRECTORS OF MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.; CHARLES C. T. STULL, Director; MERHL A. ADAMS, Director; H. LEHMAN TOMS, Director; UPTON F. GLADHILL, Director; PAUL B. HARLAN, Director; ALTON A. WHITE, Director; HARRY W. T. FOUCHE, Director; W. J. Hahn, Director; HOWARD W. CLARKE, Director; J. HOMER REMSBERG; WILLIS D. REMSBERG, Director; LESTER W. HUFF, Director; EDWARD C. NORMAN, President and Director; GILES H. MILLER, JR., Director; UNITED DAIRY INDUSTRY ASSN., AND MR. GLEN LAKE, President; AMERICAN DAIRY ASSOCIATION, AND DIRECTORS THEREOF FROM 1963 TO PRESENT DATE; INTERSTATE MILK PRODUCER'S

COOPERATIVE; MID-AMERICAN DAIRY ASSN., MEMBER OF UNITED DAIRY INDUSTRY ASSOCIATION; PRODUCER AGENCY OF F. O. #4, J. Homer Remsberg, Jr., and Sara L. Remsberg and Adrian McCardell Remsberg,

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. C. Stanley Blair, District Judge.

Submitted: July 31, 1978 Decided: November 3, 1978

Before HAYNSWORTH, Chief Judge, BOREMAN, Senior Circuit Judge, and HALL, Circuit Judge.

(Frank P. Parish and Theodore Fisher Parish, Appellants (on brief), Pro Se; Edward L. Merrigan (on brief) Lead Attorney for Non-Government Appellees.)

PER CURIAM:

Frank P. Parish and Theodore Fisher Parish, acting *pro se*, have appealed the district court's dismissal of their civil suit against the United States Secretary of Agriculture, the Maryland and Virginia Milk Producers Association, Inc., and numerous other governmental and private entities and individuals. All appellees have joined in a motion to summarily affirm the lower court's holding. After fully reviewing the record along with other materials submitted to this Court by the parties, we are persuaded that the district court ruled correctly with respect to each of the five claims asserted by the Parishes in

their amended complaint and that the motions for summary affirmance should be granted.

The Parishes' suit, which was preceded by protracted state court litigation between many of the same parties, was based on allegedly fraudulent acts committed by the Maryland and Virginia Milk Producers Association, Inc., and various other appellees during a period in which the Parishes were members of the Association. The first three claims depended on their contention that the Parishes were involved in an express trust relationship with the Association, which, through directors, officers and trustees, conspired to defraud them and other Association members and to deprive them of property without due process of law. In addition to damages, the Parishes sought both an accounting and a declaratory judgment that the trust relationship in fact existed and continued to exist despite the fact their membership in the Association ceased in 1966.

Comparing the pleadings of these claims with two published opinions of the Maryland Court of Appeals, the district court found that appellants were attempting to relitigate matters already decided in the state courts and held that "[w]hether the analytical base is res judicata, full faith and credit, or outright lack of jurisdiction, it is clear that the [claims] must be dismissed." The Parishes now assert that the court erred in dismissing the claims on such grounds without holding a hearing and receiving proof that the issues raised were in fact litigated in the state court proceedings. In support of their position they claim that neither the district court's opinion nor the pleadings of any of the cases reveal that the trust relationship issue was previously tried.

We cannot agree with the Parishes' contentions. The defense of res judicata may properly be asserted in the context of a motion to dismiss when supported by facts apparent on the face of the complaint. *See Thomas v. Consolidation Coal Company*, 380 F.2d 69, 75 (4th Cir.), *cert. denied*, 389 U.S. 1004 (1967); *Iacaponi v. New Amsterdam Casualty Company*, 379 F. 2d 311 (3rd Cir. 1967), *cert. denied*, 389 U.S. 1054 (1968); 5 Wright and Miller, § 1357 at pp. 607-609. Here, the Parishes' amended compaint clearly revealed that the state courts had ruled on the trust relationship issue. Under such circumstances it was within the district court's discretion to take judicial notice of the state court opinions, portions of which were quoted in the complaint, when certain defendants raised the res judicata defense in preliminary motions. *See Iacaponi v. New Amsterdam Casualty Company, supra*, 379 F.2d at 312.

After our own examination of the complaint and the state court opinions, we too are persuaded that the claims should have been barred on res judicata principles. That the trust relationship issue was argued and decided both at trial and on appeal in the state courts is manifestly apparent from the Maryland Court of Appeals second published opinion. *Parish v. Maryland and Virginia Milk Producers Association*, 277 A.2d 19, 21-22 nn. 1 & 2, 48 (1971). Even if the decision on appeal was based on an incorrect application of the law, as the Parishes contend, it did not thereby become a nullity for res judicata purposes. *See Rooker v. Fidelity Trust Company*, 263 U.S. 413, 415-16 (1923). The proper place to challenge the trial court's ruling was in the Maryland Court of Appeals. When the Parishes did so, the decision was affirmed. The correctness of that decision cannot now be appealed to the federal courts.

Accordingly, we affirm the district court's dismissal of the Parishes' first three claims on res judicata grounds.*

In their fourth claim for relief, appellants sought declaratory and injunctive relief against the Secretary of Agriculture and the Commodity Credit Corporation with respect to the issuance of federal milk price supports. The claim was dismissed on the basis of the district court's ruling that appellants lacked standing to sue either as members of the Association or as taxpayers and milk consumers. We fully concur with the lower court's reasoning and deem appellants' arguments on appeal to be frivolous.

The Parishes' fifth and final claim for relief consisted of charges that their former trial attorneys conspired to violate appellants civil rights by failing to plead and prove properly the existence of the alleged trust relationship and to introduce certain evidence relating to the Association's solvency. Jurisdiction was alleged to exist under 42 U.S.C. § 1985. The district court, in addition to dismissing the claim as being barred by the Maryland statute of limitations, held that the claim was not cognizable under the civil rights statute because

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*The Parishes further argue that res judicata is inapplicable because the state trial court's judgment was tainted by fraud. We are unable to perceive, however, why fraud at the trial level, whether intrinsic or extrinsic, should negate the effect of the appellate court's legal ruling as to the absence of an express trust relationship under the laws of Maryland. The Parishes apparently fail to understand that the ruling on appeal alone, right or wrong, operates to bar federal court litigation of the same issue.

there was no allegation of a class-based discriminatory animus and because the alleged conspiracy was merely private in nature.

Regardless of the statute of limitations issue, we agree with the district court that the allegations are insufficient to establish a cause of action under 42 U.S.C. § 1985. The Parishes argue that the alleged conspiracy was class-based in that it resulted in the defrauding of each member in the Association and no one else. It is not enough, however, that a class of persons similarly situated might have been adversely affected by the conspiracy; the conspiracy must have been actually motivated by the class-based animus, and the animus must have been invidiously discriminatory. *See Harrison v. Brooks*, 519 F.2d 1358, 1359-60 (1st Cir. 1975). In our opinion, no facts were alleged here that support either of these requirements.

In light of foregoing, the judgment of the district court is summarily affirmed.

APPENDIX B

Letter of September 15, 1977 to Mr. & Mrs. Frank Parish, Counsel for all Defendants from C. Stanley Blair, U.S. District Court, District of Maryland

UNITED STATES DISTRICT COURT
District of Maryland
Baltimore 21201

Chambers of
C. STANLEY BLAIR
United States District Judge

September 15, 1977

To: Mr. and Mrs. Frank Parish
Counsel for all Defendants

Re: Frank P. Parish, et al vs Maryland & Virginia Milk Producers Ass'n, Inc., et al
Civil No. B-75-1104

Dear Mr. and Mrs. Parish and Counsel:

I have reviewed the massive file in this case and have concluded that the matters before the court at this stage are solely questions of law. Since they are questions of law, I do not see that a hearing is either necessary or desirable and, accordingly, pursuant to Local Rule 6 of this court, I have decided the pending motions on the basis of the motions and memoranda in the file. A copy of my Memorandum and Order which dismisses all of the plaintiffs' claims is enclosed.

This concludes the matter in this court subject, of course, to an appeal to the Fourth Circuit Court of Appeals in Richmond, Virginia should the *pro se* plaintiffs choose to do so.

Very truly yours,

/s/_____
C. Stanley Blair

CSB:mm
Enclosure

cc: Clerk, U. S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRANK P. PARISH, et al	:	
	:	
v.	:	CIVIL NO. B-75-1104
	:	
MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., et al	:	

MEMORANDUM AND ORDER

The court will not attempt to recount the history of this quixotic odyssey which threatens to become a latter day *Jarndyce v. Jarndyce.*[1] The earlier campaigns of this crusade

[1] C. Dickens, Bleak House (1852) (passim).

are described fully in *Parish v. Maryland & Va. Milk Producers Ass'n*, 250 Md. 24, 242 A.2d 512 (1968) (*Parish I*), and *Parish v. Maryland & Va. Milk Producers Ass'n*, 261 Md. 618, 277 A.2d 19, *cert. denied*, 404 U.S. 940 (1971) (*Parish II*). The amended complaint[2] analytically consists of three distinct parts. The first encompasses a plethora of allegations about the legal relationship between Maryland and Virginia Milk Producers Association [Association] and its members. The second relates to the level of federal milk price supports and the third concerns the quality of the representation provided by the attorneys plaintiffs retained in the *Parish I* and *Parish II* litigation. In apparent recognition of the validity of defendants' motions to dismiss based on the lack of complete diversity between the parties, plaintiffs abandoned diversity as the asserted basis of jurisdiction in their amended complaint and rely instead on numerous federal statutes as well as the general equity jurisdiction of the court. All defendants have moved to dismiss for a variety of reasons.

[2] As with many, if not most, *pro se* pleadings, the amended complaint in this case is not precisely drawn. The caption to the amended complaint names as defendants forty-six individuals, five associations, three federal employees or organizations, and two partnerships. The amended complaint which is fifty pages long containing 114 numbered paragraphs mentions only thirty-one defendants by name although certain persons enumerated in the caption are described by title or position rather than by name.

One defendant, William J. Hughes, Jr., is apparently deceased and neither he nor his estate has been served. Defendants Goldman and Sherwood, who are named in their capacities as executors of the Robinson estate, have moved to dismiss or

The defendants have raised res judicata as a bar to this action. The heart of the res judicata doctrine is the public policy that all litigation must at sometime end and once tried, issues which were tried or should have been tried are settled forever, as between the parties. *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931); *Beall v. Kearney & Trecker Corp.*, 350 F. Supp. 978, 981 (D.Md. 1972). While every person has the fundamental right to be heard, there is no public policy in favor of allowing him an opportunity to raise the same issues in a second forum. *See Eisel v. Columbia Packing Co.*, 181 F. Supp. 298, 301 (D.Mass. 1960).

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[2] (continued)

quash return of service on the ground that service was insufficient (Paper 9). Goldman's and Sherwood's affidavits, as well as the affidavit of their attorney, reveal that service was effected on Peter Mosner rather than Goldman and Sherwood. The affidavits further indicate that Mr. Mosner was not authorized to be an agent to accept service of process for either Goldman or Sherwood. Plaintiffs' response (Paper 13) to the Goldman-Sherwood motion to dismiss does not refute or contest the defendants' affidavits and their motion to quash therefore will be granted. *Cf.* Bricklayers' Int'l Union v. Seymour Ruff & Sons, Inc., 160 Md. 483, 154 A. 52, 55-56 (1931).

Defendants Toms and Miller have also moved to quash service of process based on plaintiffs' failure to comply with Maryland Rules of Procedure 104(b) (2) and 107(a) (2). (Paper 15). The two rules, which apply to service by registered mail within and outside of Maryland respectively, require that an affidavit be filed stating first, that the summons was mailed to the defendant and second, that they were in fact received as evidenced by the defendant's signature on the return receipt. The return receipts for both Toms and Miller indicate that persons other than the defendants were served. Plaintiffs'

A comparison of the first three causes of action in the amended complaint with the extensive and detailed *Parish I* and *Parish II* opinions shows that plaintiffs are attempting to relitigate claims that were presented and decided adversely to them in the state proceedings. This court sits neither as a second chance forum for losing litigants nor as a court of appeals reviewing decisions of state appellate courts. Whether the analytical base is res judicata, full faith and credit, or outright lack of jurisdiction, it is clear that the plaintiffs' first three causes of action must be dismissed. *Rooker v. Fidelity*

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[2] (continued)

reply to the motion is unresponsive on this issue. (Paper 33). The motion of Toms and Miller to quash service of process will be granted.

Defendant Mid-America Dairymen, Inc. (incorrectly denominated as the Mid-American Dairy Association in the complaint) has moved to dismiss on the ground that the court lacks personal jurisdiction over it. (Paper 27). Mid-America asserts that it is an agricultural cooperative marketing association incorporated in Kansas, which conducts no activities in Maryland sufficient to bring it within the ambit of the Maryland long arm statute, *Annotated Code of Maryland*, Cts. & Jud. Proc. Art., § 6-103 (1974). Although they argue to the contrary (Paper 45), plaintiffs have not satisfied their burden of alleging adequate jurisdictional facts. McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). Nor does the fact that Mid-America is an alleged coconspirator of any consequence because plaintiffs' conclusory allegations are insufficient to invoke the conspiracy theory of jurisdiction. *See* Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1341 (2d Cir. 1972). Mid-America's motion to dismiss will be granted.

Trust Co., 263 U.S. 413, 415 (1923); *Tang v. Appellate Division of N.Y. Sup. Ct. First Dept.*, 487 F.2d 138, 141 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974); *Resolute Ins. Co. v. North Carolina*, 397 F.2d 586, 589 (4th Cir.), *cert. denied*, 398 U.S. 978 (1968); 28 U.S.C. § 1738.

Res judicata, however, is not a bar to the fourth and fifth causes of action because they were neither litigated nor could they have been litigated in the state proceedings. Despite plaintiffs' assertion to the contrary, the only proper defendants to the fourth cause of action are the Federal Defendants.[3] The remaining defendants' motions to dismiss the fourth cause of action will be granted. In paragraph 66 plaintiffs allege:

> The decisions of the Secretary of Agriculture increasing the milk price support level have been arbitrary, capricious, unlawful and entirely lack the support of proper accounting reports of receipts and disbursements by milk cooperatives resulting from sale and disposition of milk and other property held in trust as above alleged.

Plaintiffs seek an injunction prohibiting the issuance of any milk price supports until the Maryland and Virginia Milk Producers Association issues annual certified operating statements. The Federal Defendants have moved to dismiss on the grounds that the plaintiffs lack standing to challenge the Secretary's milk support decisions. Plaintiffs respond by quoting from

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[3] The Federal Defendants are the Secretary of Agriculture, the Commodity Credit Corporation and Producer Agency of F.O. #4.

paragraph 4 of the amended complaint where they allege that this action is brought "on their own behalf as producers of milk consigned" to the Maryland and Virginia Milk Producers Association. Plaintiffs' membership in the Association, however, ceased in 1966 and they no longer have standing to bring this action as an association member. *See Armstrong v. Frostie Co.*, 453 F.2d 914, 917 (4th Cir. 1971); *Kenrich Corp. v. Miller*, 377 F.2d 312, 314 (3d Cir. 1967).

Although plaintiffs contend in paragraph 67 that they are consumers of milk and taxpayers affected by the level of milk price supports, plaintiffs have not responded to the Federal Defendants' assertion that they lack standing in these capacities and indeed, they cannot. The court in *Nader v. Butz*, 398 F. Supp. 398 (D.D.C. 1975), denied plaintiffs leave to file a second amended complaint similar to the amended complaint in this action. The court stated:

> Plaintiffs would prosecute their second amended complaint "on their own behalf and on behalf of all consumers of milk and milk products, and of all taxpayers." But as either consumers of milk or taxpayers, they lack standing to bring this claim. *Schlesinger v. Reservists to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974); see *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974); *Warth v. Seldin*, [422] U.S. [490], 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

398 F. Supp. at 400. The *Nader* holding is fully applicable to this action and plaintiffs' fourth cause of action will be dismissed.[4]

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[4] The Federal Defendants' alternative ground for dismissal is equally valid. In paragraph 65, plaintiffs allege that the Secretary of Agriculture must consider the factors listed in 7 U.S.C. § 1421 (b) when he sets the milk price support level. Plaintiffs fail to recognize that the nine factors apply "[e]xcept as otherwise provided" in the Agricultural Act of 1949. Milk price support levels are governed not by section 1421, but by 7 U.S.C. § 1446 which provides in pertinent part:

> The Secretary is authorized and directed to make available (without regard to the provisions of title III (7 U.S.C. §§ 1447-49) price support to producers for tung nuts, honey and milk, as follows:
>
> . . . .
> . . . .
>
> (c) The price of whole milk shall be supported at such level not in excess of 90 per centum nor less than 75 per centum of the parity price therefor as the Secretary determines necessary in order to assure an adequate supply of pure and wholesome milk to meet current needs, reflect changes in the cost of production, and assure a level of farm income adequate to maintain productive capacity sufficient to meet anticipated future needs. . . .

Plaintiffs have not alleged that the Secretary of Agriculture has abused the discretion vested in him by section 1446(c)

Plaintiffs' fifth cause of action alleges that the defendant attorneys conspired to deprive the plaintiffs of their civil rights in violation of 42 U.S.C. § 1985 by failing to allege and prove that a trust relationship existed between the plaintiffs and the Association. It is apparent that this cause of action must be dismissed for several reasons.

Assuming that plaintiffs first discovered they had been wronged on May 5, 1971, the date *Parish II* was decided, plaintiffs waited over four years before instituting this action on August 11, 1975. The Maryland three year statute of limitations, *Annotated Code of Maryland*, Cts. & Jud. Proc. Art., § 5-101 (1974), which applies to actions brought pursuant to section 1985, bars plaintiffs' fifth cause of action. Even if the allegations were timely filed, they would nevertheless be dismissed because plaintiffs have failed to satisfy the standard enunciated in *Griffin v. Breckenridge*, 403 U.S. 88 (1971). There the Court stated:

> The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means there must be some racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action.

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[4] (continued)

and therefore have failed to state a cause of action whether or not they have standing. *See* United States v. Swift & Co., (4th Cir., *cert. denied*, 358 U.S. 837 (1958).

403 U.S. at 102 (emphasis original). A close reading of the complaint shows that it is totally devoid of any hint or suggestion of class-based discriminatory intent, *e.g.*, that persons in a class different than plaintiffs' would have been accorded treatment different from that plaintiffs received. Hence no cause of action is stated. *Stephens v. City of Plano*, 375 F. Supp. 985, 987-88 (E.D.Tex. 1974); *Brosten v. Scheeler*, 360 F. Supp. 608, 614 (N.D.Ill. 1973), *aff'd*, 495 F.2d 1375 (7th Cir. 1975). Finally, plaintiffs' conclusory allegations, at best, concern only a private conspiracy which does not fall within the ambit of section 1985. *Doski v. M. Goldseker Co.*, 539 F.2d 1326, 1334-35 (4th Cir. 1976). Defendants' motions to dismiss the fifth cause of action will be granted.

Several of the non-federal defendants have moved for the award of costs. Federal Rule of Civil Procedure 54 (d) authorizes that costs be allowed as a matter of course to prevailing parties. Under the American Rule "governing the award of attorneys' fees in litigation in the federal courts . . . attorneys' fees 'are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor' " *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 126 (1974). An exception to the American Rule, however, permits the award of attorneys' fees to the prevailing party when the losing party has "acted in bad faith, vexatiously, wantonly or for oppressive reasons." *Alyeska Pipeline Co. v. Wilderness Soc'y*, 421 U.S. 240, 258-59 (1975); *F.D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. at 129.

The court is required by *Haines v. Kerner*, 404 U.S. 519 (1972), to give *pro se* complaints a liberal construction. Under that standard the court concludes that plaintiffs' conduct has not been sufficiently egregious so as to justify the award of attorneys' fees as part of the defendants' costs. As discussed

supra, plaintiffs are barred from the further relitigation of the claims found in the first three causes of action, notwithstanding plaintiffs' desire that this court declare the *Parish II* decision to be "totally without legal significance and a complete nullity." In addition, plaintiffs' conspiracy claims found in the fifth cause of action are patently frivolous. Plaintiffs therefore are put on notice that any further attempt[4] to litigate the claims in the first, second, third, and fifth causes of action may result in the assessment of costs, including attorneys' fees, by any court having jurisdiction over the parties because such relitigation would be in bad faith or for purposes of harassment.

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[4] This is the fourth action brought by the plaintiffs against the Maryland and Virginia Milk Producers Association. Plaintiffs' original suit against the Association was filed in the Circuit Court for Baltimore County, Maryland on January 24, 1965 and was dismissed on February 8, 1965. Parish v. Maryland & Va. Milk Producers Ass'n, Inc., Equity No. 54599 78/19 (Baltimore County, Md. Cir. Ct.). In the interim, plaintiffs filed Parish v. Maryland & Va. Milk Producers Ass'n, Inc., Equity No. 29,524 (Montgomery County, Md. Cir. Ct.) on February 4, 1965. The full history of that case can be found in the *Parish I* and *Parish II* opinions cited earlier. On August 8, 1973 plaintiffs filed suit in the Circuit Court for Frederick County, Maryland. That action was dismissed without prejudice on November 13, 1973. Parish v. Maryland & Va. Milk Producers Ass'n, Inc., Equity No. 24,465 (Frederick County, Md. Cir. Ct.). This suit was instituted August 11, 1975.

Accordingly, it is this 15th day of September, 1977, ORDERED that plaintiffs' claims be, and hereby are, DISMISSED.

/s/_____
C. Stanley Blair
United States District Judge

APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

FRANK P. PARISH, et al	:	
	:	
v.	:	CIVIL NO. B-75-1104
	:	
MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., et al	:	

****

WHAT BECAME OF ALL THE GREAT PROFITS TO PRODUCERS? PLAINTIFFS ALLEGE THAT THE PRICE TO PRODUCERS WAS REDUCED YEARLY AS NOTED BELOW; THE RETAIL * INCREASED WHILE PRICE PAID TO FARMERS, DECREASED:

(1954-1966)
Reduction in Price Paid
Producers from 1950-1967

* See Exhibit X to Appendix to Appellants' Complaint.

Year	Production Gal. Per Day	Milk Price Per 100 Pounds of 3.5% (Fat) Milk	Price Change Per 100 lb. Below Average of 4 Previous Years	Loss Revenue to Producers
1950	152,181	$5.05		
1951	161,055	5.72		
1952	168,938	5.92		
1953	190,004	5.46		
		=$22.15 ÷ 4		
		Aver. 5.53	$5.53	
1954	198,390	5.17	.36	$2,174,108.
1955	208,314	5.07	.46	2,916,992.
1956	224,311	5.03	.50	3,414,126.
1957	232,873	5.09	.44	3,119,110.
1958	230,824	5.06	.47	3,302,461.
1959	240,983	4.84	.69	5,061,677.
1960	243,717	4.89	.64	4,748,153.
1961	248,043	4.79	.74	5,587,501.
1962	246,232	4.65	.88	6,596,082.
1963	244,737	4.61	.92	6,854,035.
1964	237,995	4.78	.75	5,433,604.
1965	233,688	4.93	.60	4,268,218.

Employment Terminated (Hooper & Robinson) - (Parish Suit Filed 1965)

Members Loss of Revenue prior to Hooper, Robinson Employment Termination and Parish, et al., litigation	$53,476,067.

1966	229,425	5.51	.02	139,678.
1967	235,335	5.84	(Gain) +.31	$2,220,788

(The highest price paid in 15 years.)

Plaintiffs have multiplied the cwt of *milk produced each* year by the drop in price per cwt to arrive at the reduced income to producers of $53,476,067. during the years 1954 to 1965, as detailed above.

APPENDIX 2

EXHIBIT H

MARYLAND AND VIRGINIA MILK PRODUCERS ASSN. INC. JOINT MEETING OF FINANCE AND EXECUTIVE COMMITTEES

October 20, 1964

A joint meeting of the Finance and Executive Committees of the Board of Directors was held at the offices of the Association located at 1530 Wilson Boulevard, Arlington, Virginia, on Tuesday, October 20, 1964.

There were present,

Directors:

Edward C. Norman
Luther L. Day
Charles C. T. Stull
Merhl A. Adams
H. Lehman Toms
C. Thomas Sollenberger
Upton F. Gladhill
Paul B. Harlan
Giles H. Miller, Jr.
Wm. C. Crossman, Jr.

with Mr. Van Metre absent.

Also Secretary-Treasurer: James E. Click
Assistant Secretary: Paul H. Snyder
Comptroller: J. W. Marshall, Jr.
Tax Attorney: Leonard Silverstein

Mr. Norman, President of the Association, presided and Mr. Snyder acted as secretary of the meeting which was called to order at 1:30 p.m.

Mr. Click and Mr. Snyder reviewed with the Committees the current status of the Association's Revolving Fund in relation to the outstanding Capital Revolving Fund Certificates, pointing out that certificates outstanding are in excess of the Revolving Fund and the primary reason for the difference is the effect of the discount on the Embassy Dairy note.

Mr. Silverstein suggested to the Committee several ways to make up the deficit as follows:

1) At the time of redemption, certificates would be redeemed at less than 100% of face value.

2) Sell land at the Manufacturing Division at a gain and pay tax on same.

3) Withhold a portion of current year's earnings over a period of 10 or 12 years and pay tax on same.

4) Continue to spread the deficit over all years in the Reserve.

5) Book write-up of Class C Stock of Baltimore Bank for Cooperatives and Patronage Dividends of Valley of Virginia Milk Producers now on Association's books at $1.00.

After considerable discussion by the committees, upon motion of Mr. Miller, seconded by Mr. Sollenberger, the next Finance Committee meeting was scheduled for 9:00 a.m. on Friday, November 13, and another joint meeting of the Finance and Executive Committees at 11:00 a.m. on Friday, November 13, to again consider the matter of the Revolving Fund Certificate over-write and the Association's auditors, Price Waterhouse, be asked to attend if it was felt necessary.

Mr. Marshall reviewed with the committees the methods available for pricing milk delivered to the Marva Maid Division and the effects of each. In conjunction with this presentation, Mr. Marshall also presented a cash projection through 1964.

In view of the presentations made, the committees discussed at length the advisability of redeeming the Non-Interest Series 1958 Capital Revolving Fund Certificates.

After careful consideration, upon motion of Mr. Miller, seconded by Mr. Crossman, it was recommended to the Board that no change be made in the decision not to redeem the non-interest Series 1958 Capital Revolving Fund Certificates.

Upon motion of Mr. Day, seconded by Mr. Adams, the meeting adjourned at 4:30 p.m.

/s/_____
Edward C. Norman
President

/s/_____
Paul H. Snyder
Assistant Secretary

APPENDIX 3

EXHIBIT M

EDITORIAL COMMENT

MUST THE PHILADELPHIA HANDLER POOL BE DISCARDED?

HOARDS DAIRYMAN
JULY 10, 1965

As this is written, dairy leaders in the eastern part of the country are submitting evidence on the proposed termination of the Delaware Valley federal milk marketing order. The U. S. Department of Agriculture has indicated it is considering dropping the order which sets minimum prices for dairymen shipping milk to handlers in Philadelphia, Wilmington, and the southern New Jersey area.

According to the official USDA notice, here is the picture in the order:

> "Audits of the records of various cooperative associations and proprietary handlers and other investigation have revealed widespread practices resulting in the undercutting of the established minimum order prices. Further, efforts appear to have been made to conceal the true nature of the transactions by: The maintenance of incomplete or dual records; the establishment of dummy corporations and the use of third party intermediaries; the establishment of special accounts through which

payments for alleged services are made; payments in the guise of brokerage fees, all or part of which eventually accrue to the proprietary handler or persons intimately associated with such handler, and by other intricate and devious means. To the extent possible in the circumstances, all available legal procedures will be pursued in an effort to enforce the existing order as to any past or current violations."

The incentive for financial skulduggery may be found in the difference between the April Class I price of $5.40 in Philadelphia and the New York-New Jersey order blend price of $3.80 at country plants no more than 70 miles from Philadelphia.

We are not advised of the exact nature of the "violations" in the Delaware Valley order but we have received several reports from knowledgeable persons indicating a messy situation has developed. Further, some cooperatives have been playing in the mud, too.

The market has an individual handler pool. Thus, it has been able to maintain a high Class I utilization with corresponding high prices to its farmers. But neighboring marketwide pools charge that they are carrying reserves for the Delaware Valley order. Various charges and countercharges have been tossed around. For example, one report has it that New York-New Jersey producers are taking 5.5 cents less in their blend price because of five years of producers switching markets. On the other hand, a Delaware Valley cooperative official predicts a drop of 50 cents to his producers should the order go out. We cannot verify any of these estimates. They do indicate what is at stake, however.

Our concern has to do with what appears to be a definite war of attrition going on against handler pools. Personally, we carry no brief or grief for handler pools. We do know that they have served their own producers well. True, they may not carry enough of their own reserves but we believe this argument often has been overstated. We cannot blame marketwide pools for wanting to have the handler pools merged with theirs. But look at the low Class I utilization mess most of these markets are in! It becomes a matter not of sharing wealth but of sharing poverty.

If the marketwide pools could use Class I bases and get their markets in decent shape, the merger of pools would not bring economic hardship to handler pool producers. As it is now, we see only a grave injustice to these farmers.

USDA says the present situation in the Delaware Valley order results in "almost insurmountable administrative difficulties." This indicates one of two things: Either USDA cannot enforce the law . . . or the law is inadequate to proper enforcement. For the first there is no valid excuse. For the latter, let USDA ask for remedial legislation in the Marketing Agreements Act which authorizes federal milk orders.

We simply cannot see the logic of burning down the house to get to a few vermin who happen to have infested it.

APPENDIX 4

EXHIBIT M-1

EDITORIAL COMMENT

DAIRYMEN AND THE BIGGEST "RELIEF" PROJECT IN HISTORY

HOARDS DAIRYMAN
JANUARY 25, 1971

When the government gets around to setting the milk price support level this year, and, if it gives further consideration to the use of an economic formula for pricing Class I milk, it would be well for the decision-makers to look at the overall picture andwhat dairymen have undergone in the past.

A case in point is the dramatic developments of the 1950's. *Here are some of the highlights:*

In 1952, dairymen marketed 98 billion pounds of milk, for which they recieved $4.6 billion.

In 1959, they sold 112 billion pounds and still received only $4.6 billion.

Thus, for 14 billion more pounds of milk, dairy farmers did not receive one cent more.

Since it takes 557 pounds of milk to provide the average person all the milk, butter, cheese and other dairy products he now consumes each year, the additional milk marketed in 1959 would provide 25 million people with all their dairy products for a year.

Putting it another way, we provided enough extra milk "for free" to supply all the people in 15 of our largest cities. They are: New York City, Chicago, Los Angeles, San Francisco, Detroit, Kansas City, St. Louis, Boston, Philadelphia, Baltimore, Cleveland, Columbus, Houston, Dallas, and Atlanta.

If the extra milk marketed in 1959 had brought farmers the 1952 price, it would have meant $693 million more for dairymen. This was our "relief" project for the "poor" consumers, whose per capita income boomed 25 percent over the seven-year period!

APPENDIX 5

EXHIBIT N-1

Inter-State Milk Producers'
Cooperative
1225 Industrial Highway
Southampton, PA 18966

October 17, 1974

Mr. Frank P. Parish
Route 1
Taneytown, MD 21787

Dear Mr. Parish:

Your request for information on payments to Atlantic Dairy Association from Maryland and Virginia Milk Producers Association, Inc. arrived while I was in Chicago testifying for a Class I price increase for dairy farmers.

I do not have the information for two reasons; first, the offices of the Atlantic Dairy Association were closed during 1972 and the files have been permanently retired. There is no clerical help available to reactivate these files; second, during the years 1968, 69 and 72 Maryland and Virginia Milk Producers Association may have had additional local advertising programs with the American Dairy Association in addition to the payments made to Atlantic Dairy Association to the extent that such monies were paid but the records of Atlantic Dairy Association

would be inadequate as a representation of the money paid to the American Dairy Association.

During the year 1973 there were no payments to American Dairy Association of Atlantic from Maryland and Virginia Milk Producers Association.

I am sorry that I cannot be of more help to you in this matter.

Sincerely yours,

INTER-STATE MILK
PRODUCERS' COOPERATIVE

Paul E. Hand
Asst. Gen. Manager
and Assistant Secretary

PEH:MS

CC: Mr. James E. Click
CC. Mr. Alden R. Grimes

APPENDIX 6

EXHIBIT N-2

Smathers, Merrigan & Herlong
Attorneys and Counsellors at Law
888 Seventeenth Street, N.W.
Washington, D.C. 20006
Telephone 202-785-5300
Cable Address: Smathers

June 6, 1975

Mr. Frank P. Parish
Route 1
Taneytown, Maryland 21787

Dear Mr. Parish:

Your letter of May 23, 1975 addressed to Mr. Walter A. Martz, President of Maryland and Virginia Milk Producers Association, Inc., has been referred to me for reply.

As I advised you on August 6, 1974, the Association does not intend to make available any further documents or information to aid you in the preparation of another spurious complaint against the Association. Your membership in the Association terminated several years ago, and as mentioned in my letter of August 6, 1974, you are well aware of the fact that four different courts in Maryland, including the Court of Appeals, have already dismissed your complaints against the Association as baseless and unsustainable.

Regarding the sheet forwarded with your letter of May 23 entitled "List of Payments Made For Which There Has Been No Accounting," please permit me to caution you that the Association has never made any contributions to any so-called "Dairy Counsel," and nothing paid to the American Dairy Association or to any other person, group or corporation has involved, directly or indirectly, "monies paid for political protection and favors" or for any similar unlawful or improper purpose.

Consequently, I want to reiterate that if you proceed to file still another groundless suit against the Association or against any of its officers, directors, attorneys or employees, we intend to hold you and any other persons who join in such complaint personally responsible for any damages, losses or court costs incurred as a result.

Very truly yours,

Edward L. Merrigan
General Counsel,
Maryland and Virginia Milk
Producers Association, Inc.

ELM/ct

cc: Mr. Walter A. Martz
Mr. James E. Click

APPENDIX 7

EXHIBIT N-3

American Dairy Association
6300 North River Road
Rosemont, Illinois 60018
Telephone 312-696-1880

October 2, 1974

Mr. Frank P. Parish
Route 1
Taneytown, Maryland 21787

Dear Mr. Parish:

In response to your letter requesting investment figures for four years, I'm embarrassed to find that we don't have the specific information that you wish.

The monies paid to American Dairy Association directly and, more recently, through United Dairy Industry Association have come from the Atlantic Dairy Association (American Dairy Association of Atlantic) and the producer agency of Federal Order No. 4. While we know that we have received funds from Maryland & Virginia Milk Producers through the above groups, we do not have any breakdown to show what portion of such funds came from MVMPA. While the regional organization now bears our name, it is an indpendent corporation so that we have no legal basis for examining its records.

Inasmuch as the Federal Order is subject to USDA audit, it shouldn't be a problem to get figures since formation of the Order. On those funds and those of Atlantic, you can perhaps get the data you need from Dr. Paul Hand, Interstate Milk Producers Coop., 1225 Industrial Blvd. Southampton, Pennsylvania 18966.

Sorry that I couldn't be of direct assistance as I'd anticipated, but I'm sure that Dr. Hand will cooperate in any way he can.

Sincerely,

Alden R. Grimes
Executive Vice President

ARG:lm

APPENDIX 8

EXHIBIT Q

We have considered elsewhere the principles which are applicable in the case of express trustees.[1]

---

§ 495. [1] See § § 170-170.25.

APPENDIX 9

EXHIBIT W

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC.
JOINT MEETING OF FINANCE AND EXECUTIVE COMMITTEES

November 13, 1964

A joint meeting of the Finance and Executive Committees of the Board of Directors was held at the offices of the Association located at 1530 Wilson Boulevard, Arlington, Virginia, on Friday, November 13, 1964.

There were present,

Directors:

Edward C. Norman, President
Upton F. Gladhill
Paul B. Harlan
Giles H. Miller, Jr.
I.D. Van Metre
Wm. C. Crossman, Jr.
Luther L. Day
Charles C. T. Stull
Merhl A. Adams
H. Lehman Toms
C. Thomas Sollenberger

Also Secretary-Treasurer: James E. Click
Assistant Secretary: Paul H. Snyder
Comptroller: John W. Marshall, Jr.

The meeting was called to order at 11:10 a.m., by the President, Mr. Norman, and Mr. Snyder acted as secretary of the meeting.

Mr. Click reviewed with the committee the discussion and alternatives offered at the joint meeting of the com mitees on October 20 in connection with the amount of Certificates written over the amount in the Revolving Fund.

Mr. Click advised that after further consideration by the staff and Mr. Silverstein, he recommended that no definite action be taken until after December 31, 1964. He stated that it was also felt that the only two alternatives to consider should be to sell land at Laurel at a gain or withhold a portion of current year's earnings over a period of 10 or 12 years and pay tax on same.

It was the feeling of the committee that Mr. Click's recommendation be followed.

Mr. Click also advised that the matter of patronage dividends from the Baltimore Bank for Cooperatives and the Valley of Virginia Milk Producers was discussed with Mr. Silverstein in view of the uncertainty of redemption. He reported that consideration was being given to the issuance of a separate allocation to producers for these amounts only and advice given that redemption would not be made until the Association receives the funds from the Baltimore Bank for Cooperatives and from the Valley of Virginia Milk Producers.

Supreme Court, U.S.
FILED
FEB 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1246

FRANK P. PARISH AND THEODORE FISHER PARISH,
Petitioners,

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD L. MERRIGAN
6000 Connecticut Avenue, N.W.
Washington, D.C. 20015

Attorney for Respondent Maryland and Virginia Milk Producers Association, Inc.

February 28, 1979

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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IN THE

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OCTOBER TERM, 1978

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FRANK P. PARISH AND THEODORE FISHER PARISH,
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v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF OF RESPONDENT MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AND MOTION TO DISMISS PETITION FOR WANT OF STATUTORY JURISDICTION, AND BECAUSE THE ISSUES RAISED BY THE PETITION WERE SETTLED BY THIS COURT'S DENIAL OF CERTIORARI IN A CASE BETWEEN THE SAME PARTIES EIGHT YEARS AGO

Respondent Maryland and Virginia Milk Producers Association, Inc. hereby submits this brief in opposition to the petition for certiorari herein, and it moves

to dismiss said petition on the grounds (a) that this Court lacks statutory jurisdiction over this case, the petition for certiorari having been filed on February 12, 1979, more than ninety (90) days after entry of the Court of Appeals' judgment herein on November 3, 1978, and (b) that the issues raised by the petition were settled by this Court's denial of certiorari in a case between the same parties eight (8) years ago.

OPINIONS BELOW

The unreported November 3, 1978 opinion and judgment of the United States Court of Appeals for the Fourth Circuit are printed in the Appendix to the Petition for Certiorari at pages A-1 through A-6.

The unreported opinion of the United States District Court for Maryland, which was unanimously affirmed by the Court of Appeals' judgment, is also printed in the Appendix to the Petition for Certiorari at pages A-7 through A-18.

THIS COURT LACKS JURISDICTION

This Court does *not* have jurisdiction over this case because the petition for writ of certiorari was not filed until February 12, 1979, a date more than ninety (90) days after entry of the Court of Appeals' judgment of November 3, 1978, in violation of the provisions of 28 U.S.C. 2101(c) and Rule 22 of the Supreme Court Rules.

STATUTES AND RULES INVOLVED

(a) Title 28 U.S.C. 2101(c), as here relevant, provides:

> "*Supreme Court; Time For Appeal Or Certiorari; Docketing* . . .

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of said judgment or decree . . . ."

(b) Rule 22(3) of the Supreme Court Rules, in turn, provides as here relevant:

> "*Review On Certiorari—Time For Petitioning.*
>
> "3. A petition for writ of certiorari in all other cases shall be deemed in time when it is filed with the clerk within the time prescribed by law."

QUESTIONS PRESENTED

1. Does this Court have statutory jurisdiction to entertain a petition for writ of certiorari in a civil case wherein the petition was filed more than ninety (90) days after the date of entry of the Court of Appeals' judgment, in violation of 28 U.S.C. 2101(c) and Rule 22(3) of this Court's Rules?

2. Should this Court even consider a petition for certiorari in a case where the petition essentially raises for relitigation issues that were settled by this Court's denial of certiorari eight (8) years ago in a case between the same parties?

STATEMENT OF THE CASE

This suit constitutes the fourth time in approximately fourteen (14) years that respondent Maryland and Virginia Milk Producers Association, Inc. (hereinafter referred to as the "Association"), its officers, directors, accountants, attorneys and various other parties have been forced by legal process to defend

against essentially the same false, specious claims filed by the same plaintiffs, Mr. and Mrs. Frank P. Parish. The long, extremely oppressive, costly history of this seemingly endless litigation is as follows:

(i) Litigation in the Baltimore County, Maryland Circuit Court.

In January, 1965, the Parishes filed the first version of their baseless complaint in the Circuit Court for Baltimore County, Maryland (*Parish* v. *Maryland and Virginia Milk Producers Association, Inc.*, Equity No. 54599 78/19).

The Association and the other defendants moved to dismiss on several grounds, including total lack of jurisdiction. As a result, in February, 1965, an order of dismissal was entered by the court, and the Parishes were directed to pay costs.

(ii) Litigation in the Montgomery County, Maryland Circuit Court, The Maryland Court of Appeals, and the Supreme Court of the United States.

In February, 1965, the Parishes filed essentially the same baseless complaint against the Association, its officers, directors, attorneys, accountants and other parties in the Montgomery County, Maryland Circuit Court. The complaint was amended three (3) times, but it too was dismissed in response to demurrers filed on behalf of the Association and the other defendants.

Mr. and Mrs. Parish appealed to the Maryland Court of Appeals, which subsequently ruled that the complaint contained sufficient allegations to warrant a trial (see *Parish* v. *Maryland and Virginia Milk Producers Association, Inc., et al.*, 250 Md. 24, 242 A.2d 512 (1968)).

The oppressive, costly proceedings which thereafter ensued were described by the Maryland Court of Appeals in a later opinion it rendered in 1971 as follows (see *Parish* v. *Maryland and Virginia Milk Producers Association, Inc., et al.* 261 Md. 618, 277 A.2d 19 (1971)):

> "The docket entries take up 28 printed pages. They show that the chancellor held no less than 15 hearings on motions of one kind or another and that the trial on the merits went on without interruption for four weeks. The transcript weighs over 100 pounds; the record extract and the briefs occupy in excess of 3,000 printed pages; a dozen or more pleadings (over 100 typewritten pages) have been filed [with the Court of Appeals] since the oral arguments."

Mr. Parish, however, whose groundless, specious complaint forced the Maryland courts, the Association and a large number of individual defendants to endure that extremely heavy, long, costly litigation burden, flatly refused even to appear for discovery proceedings in the case when he was ordered to do so by the circuit court. A motion was thus filed to punish him for blatant contempt of court. Mr. Parish contended that he was suffering from a circulatory problem that had adversely affected his memory and his ability to think —and thus he contended he should not be made to testify in a court proceeding. After a full hearing, however, the circuit court granted defendants' motion, and Mr. Parish was dismissed from the case for repeated contempt of the court's orders.

Plaintiff Theodore Parish (Mr. Parish's wife), however, continued to prosecute the Montgomery County action with the same attorneys, so the case thereupon proceeded to a lengthy trial on the merits. At the con-

clusion of that trial, which lasted four (4) full weeks, the Montgomery County Circuit Court carefully reviewed the evidence, passed on each and every issue presented by the parties for decision, and dismissed the complaint.

Mr. and Mrs. Parish were not satisfied, however, so again they appealed to the Maryland Court of Appeals. This time, the Court of Appeals affirmed the circuit court's rulings in every respect (see *Parish* v. *Maryland and Virginia Milk Producers Association, Inc.*, 261 Md. 618, 277 A.2d 19, cert. denied, 404 U.S. 940 (1971))—and at the end of its lengthy opinion, the Court stated, at 261 Md. 698:

> "Perhaps our decision here will bring this litigation to a conclusion. Thus endeth the lesson."

But, as demonstrated hereinbelow, the detailed, meticulous opinion of the Court of Appeals did not bring the litigation to an end. Mr. and Mrs. Parish filed a petition for writ of certiorari in the Supreme Court of the United States, but in due course, that petition was denied by this Court, almost eight (8) years ago (*Parish* v. *Maryland and Virginia Milk Producers Association, Inc.*, 404 U.S. 940, 30 L.Ed. 2d 253 (1971)).

(iii) Further Litigation in the Frederick County, Maryland Circuit Court.

Then, two (2) years later, on August 16, 1973, Mr. and Mrs. Parish suddenly decided to attempt to relitigate the entire case against the Association in the Frederick County, Maryland Circuit Court. They filed another complaint based on essentially the same old allegations and claims which had been dismissed in the Montgomery County case—and which, of course, are

again reasserted in the amended complaint dismissed by the United States District Court for Maryland and the Court of Appeals for the Fourth Circuit in the case at bar (see *Parish* v. *Maryland and Virginia Milk Producers Association, Inc.*, Equity No. 24-465 Frederick County Cir. Ct.).

Respondent Association promptly moved to dismiss, contending the Frederick County complaint was clearly barred by the doctrines of *res judicata* and collateral estoppel. When the Frederick County Circuit Court set the Association's motion for hearing on November 16, 1973, Mr. and Mrs. Parish filed a simple "Motion for Permission to Withdraw Their Bill of Complaint" which the Frederick County Court readily granted.

(iv) The Instant Litigation in the United States District Court in Baltimore, the Fourth Circuit and in This Court.

Almost two (2) years after they withdrew their specious complaint in the Frederick County Circuit Court because it was patently barred by *res judicata*, Mr. and Mrs. Parish journeyed to Baltimore and filed essentially the same old claims which had been dismissed in the Montgomery County litigation against the Association, its officers, directors, attorneys and accountants in the United States District Court for Maryland. Motions to dismiss were filed by all defendants, and after considerable litigation, the District Court dismissed the Parishes' complaint, stating (App. to Petition, page A-11):

> "This court sits neither as a second chance forum for losing litigants nor as a court of appeals reviewing decisions of state appellate courts. Whether the analytical base is res judicata, full faith and credit, or outright lack of jurisdiction, it

is clear that plaintiffs' . . . causes of action must be dismissed."[1]

The Parishes appealed to the United States Court of Appeals for the Fourth Circuit. On *November 3, 1978,* that court unanimously affirmed the district court's judgment of dismissal, holding (App. to Petition, page A-4):

> "After our examination of the complaint and the state court opinions, we too are persuaded that the claims should have been barred on res judicata principles."

On that same day, November 3, 1978, the Clerk of the United States Court of Appeals for the Fourth Circuit addressed a memorandum to all parties and their counsel specifically advising that the Court of Appeals' judgment was entered on that date, November 3, 1978, (see Appendix A hereto).

The Parishes did *not* petition for rehearing in the Court of Appeals, and they did *not* apply to this Court, or to any Justice thereof, for an extension of time to file the instant petition for writ of certiorari with reference to the Court of Appeals' decision and judgment of November 3, 1978. ***Rather, they waited one hundred one (101) days after November 3, 1978 to file their petition for writ of certiorari in this Court on February 12, 1979.***

---

[1] The district court proceeded to dismiss other causes of action inserted in the complaint on other grounds (App. to Petition, pages A-12 through A-17) and warned Mr. and Mrs. Parish as follows (page A-17):

> "Plaintiffs . . . are put on notice that any further attempt to litigate the claims . . . may result in the assessment of costs, including attorneys' fees, by any court having jurisdiction over the parties because such relitigation would be in bad faith or for purposes of harassment."

I

THE PETITION FOR CERTIORARI MUST BE DISMISSED FOR WANT OF STATUTORY JURISDICTION, SAID PETITION HAVING BEEN FILED MORE THAN NINETY (90) DAYS AFTER ENTRY OF THE COURT OF APPEALS' JUDGMENT IN VIOLATION OF 28 U.S.C. 2101(c) AND RULE 22 OF THIS COURT'S RULES

As stated above, petitioners failed (a) to file their petition for certiorari for one hundred one (101) days after entry of the Court of Appeals' judgment of November 3, 1978, and (b) to obtain any extension of time for the filing of said petition in the manner prescribed by law. Said petition for certiorari, therefore, was not filed within ninety (90) days after entry of the Court of Appeals' judgment as required by statute (28 U.S.C. 2101(c)) and by Rule 22 of the Supreme Court Rules.

Ergo, this Court is without jurisdiction over this case and the petition for certiorari must be dismissed (*Whitsitt* v. *Union Depot and Railroad Company,* 122 U.S. 363, 7 S. Ct. 1248, 30 L.Ed. 1150 (1887); *Glasgow Navigation Company, Ltd.* v. *Munson Steamship Line,* 246 U.S. 647, 38 S.Ct. 315, 62 L.Ed. 919 (1918); *Collard* v. *Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.,* 246 U.S. 653, 38 S.Ct. 336, 62 L.Ed. 922 (1918); *Citizens Bank of Michigan City* v. *Opperman,* 249 U.S. 448, 39 S.Ct. 330, 63 L.Ed 701 (1919); *Rust Land & Lbr. Co.* v. *Jackson,* 250 U.S. 71, 76, 39 S.Ct. 424, 63 L.Ed. 850 (1919); *Toledo Scale Company* v. *Computing Company,* 261 U.S. 399, 417, 418, 43 S.Ct. 458, 67 L.Ed. 719 (1923); *Hartford Accident & Indemnity Co.* v. *Bunn,* 285 U.S. 169, 175, 176, 52 S.Ct. 456, 76 L.Ed 1301; *Matton Steamboat Co.* v. *Murphy,* 319 U.S. 412, 415, 63 S.Ct. 1126 (1943); *Cole* v. *Violette,* 319 U.S. 581, 63 S.Ct. 1204 (1943).

II

THE PETITION FOR CERTIORARI IS ALSO GROUNDLESS BECAUSE, IN SUBSTANCE, IT ATTEMPTS TO RAISE FOR RELITIGATION HERE ESSENTIALLY THE SAME ISSUES SETTLED EIGHT (8) YEARS AGO BY THIS COURT'S DENIAL OF CERTIORARI IN *PARISH* v. *MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.*, 261 MD. 618, 277 A.2d 19, CERT. DENIED, 404 U.S. 940 (1971)

The purpose of statutes limiting the period for appeal or to seek certiorari is to set a definite point of time when litigation shall be at an end, and to advise appellees and respondents that they are freed of the demands against them (*Matton Steamboat Co.* v. *Murphy, supra,* at 319 U.S. 415). Indeed, even if the petition "shows a proper case for . . . allowance of [the] writ [of certiorari]," the petition must nevertheless be dismissed on jurisdictional grounds if it is filed after the time fixed by statute has expired (*Rust Land & Lbr. Co.* v. *Jackson, supra,* at 250 U.S. 76).

But here, the record before the Court shows that, in substance, the petition for certiorari attempts to present questions for relitigation which have already been settled by the highest court of Maryland in a case where this Court, in turn, denied certiorari eight (8) years ago, in 1971 (*Parish* v. *Maryland and Virginia Milk Producers Association, Inc., et al.*, 261 Md. 618, 277 A.2d 19, *cert. denied,* 404 U.S. 940 (1971).

A fortiori, the Court of Appeals for the Fourth Circuit correctly ruled in the instant case (see Appendix to Petition for Certiorari, pg. A-4):

> "After our examination of the complaint and the state court opinions, we too are persuaded that the claims should have been barred on res judicata principles."

In addition to being untimely and beyond this Court's jurisdiction, therefore, the petition herein is also groundless and patently it fails to present any important federal question or conflict in federal decisions to this Court for review. Plainly, therefore, it must be dismissed.

WHEREFORE, respondent prays that the motion to dismiss hereinabove set forth be granted and that the petition for certiorari in this case be dismissed or summarily denied.

Respectfully submitted,

EDWARD L. MERRIGAN
6000 Connecticut Avenue, N.W.
Washington, D.C. 20015

Attorney for Respondent
Maryland and Virginia Milk
Producers Association, Inc.

February 28, 1979

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that copies of respondent's opposition to petition for writ of certiorari and motion to dismiss were duly served by first class mail this 28th day of February, 1979 upon petitioners and all counsel for respondents herein.

EDWARD L. MERRIGAN

APPENDIX

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

WILLIAM K. SLATE, II
CLERK

TELEPHONE 782-2213
AREA CODE 804
TENTH AND MAIN STREETS
RICHMOND, VIRGINIA 23219

November 3, 1978

To: Mr. Frank P. Parish, Mrs. Theodore Fisher Parish, John Rounsaville, Jr., Esq., Donald F. Copeland, Esq., Harlan L. Weiss, Esq., Albert E. Brault, Esq., Theodore R. Tenzlaff, Esq., M. Peter Moser, Esq., Robert B. Barnhouse, Esq., Alan R. Sachs, Esq., Nevett Steele, Esq., Daniel M. Clements, Esq., Edward Merrigan, Esq., Leonard Schaitman, Esq., Susan R. Chalker, Esq., William B. Sumerville, Esq., Jon H. Grube, Esq., John J. O'Neill, Esq., Thomas A. Henning, Esq., M. Natalie McSherry, Esq.

CLERK'S MEMORANDUM

In compliance with Rules 36 and 45(c) of the Federal Rules of Appellate Procedure, you are advised that the judgment in case No. 78-1079 was entered this date. A copy of the court's opinion, and a blank bill of costs (omitted in criminal cases) is enclosed.

I would invite your particular attention to Rules 39(c), 40(a), and 41(b) of the Federal Rules of Appellate Procedure.

Please be advised that the policy of this court requires that petitions for rehearing, regardless whether the case was fee paid or in forma pauperis, be filed in *fifteen* copies.

When it has been determined that a stay of the mandate is an appropriate course of action, then an original petition only (no copies) to stay the mandate need be filed.

Enclosures

WILLIAM K. SLATE, II
CLERK

Rev. 9-1-76

Supreme Court, U. S.
FILED
MAR 14 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1246

FRANK P. PARISH AND THEODORE FISHER PARISH,
Petitioners,

v.

MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF PETITIONER IN ANSWER TO MOTION BY RESPONDENT MARYLAND AND VIRGINIA MILK PRODUCERS ASSOCIATION, INC., ET AL., TO DISMISS PETITION FOR WANT OF (A) STATUTORY JURISDICTION, AND (B) BECAUSE THE ISSUES RAISED BY THE PETITION WERE SETTLED BY THIS COURT'S DENIAL OF CERTIORARI IN A CASE BETWEEN THE SAME PARTIES EIGHT YEARS AGO.

FRANK P. PARISH
THEODORE FISHER PARISH
518 E. Baltimore Street
Taneytown, Maryland 21787
Appearing Pro Se.

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Respondent Maryland and Virginia Milk Producers Association, Inc. submits its brief in opposition to petition for certiorari and moves to dismiss said petition on grounds:

A. That this Court lacks statutory jurisdiction over this case, the petition for certorari having been filed on

February 12, 1979, more than ninety (90) days after the entry of the Court of Appeals' judgment on November 3, 19978; and

B. That the issues raised by the petition were settled by this court's denial of certiorari in the case between the same parties eight years ago.

QUESTIONS PRESENTED BY RESPONDENTS

1. Does this Court have statutory jurisdiction to entertain a petition for writ of certiorari in a civil case wherein the petition was filed more than ninety (90) days after the date of entry of the Court of Appeals' judgment, in violation of 28 U.S.C. 2101(c) and Rule 22(3) of this Court's Rules?

2. Should this Court even consider a petition for certiorari in a case where the petition essentially raised for relitigation issues that were settled by this Court's denial of certiorari eight (8) years ago in a case between the same parties?

PETITIONERS ANSWERS

1. The late date of filing the petition for writ of certiorari (February 12, 1979) was due to the advice of the United States Court of Appeals, Fourth Circuit, by letter dated November 15, 1978, stating "Pursuant to our telephone conversation of today, please be advised that you have ninety days from November 13, 1978, in which to file your petition for certiorari with the U.S. Supreme Court.

Sincerely yours,
William K. Slate, II

By:
Julian H. Layne Deputy Clerk

Photo copy of above letter attached hereto.

Copy of same letter was sent to the United States Supreme Court, Attention: Mrs. Ruffin, February 12, 1979.

Petitioners Parish trust that this Court will give to them (pro se complaintants) the liberal construction as was required in Hains v. Kerner, 404 U.S. 519 (1972) and the fact that the error was harmless (28 U.S.C. 2111).

2. Question - "Should this Court even consider a petition for certiorari in a case where the petition essentially raises for relitigation issues that were settled by this Court's denial of certiorari eight (8) years ago in a case between the same parties?"

Answer:

First:

The parties to the instant case are not the same as is evidenced by the facts that:

The attached list of named defendants in the instant case were not defendants in prior action, eight years ago;

The last four defendants named in said list are lawyers who represented plaintiffs Parish in said prior action and were dismissed by Parish as noted in petitioners statement of the case, page 4 of petition. The fifth named defendant, on said list, Edward L. Merrigan, is a lawyer, was and still is counsel for defendant Maryland and Virginia Milk Producers Association Inc. and so named in respondents brief herein.

The last four defendants named in said list are lawyers who represented Plaintiffs Parish in said prior action and were dismissed by Parish as noted in Petitioners Statement of the Case, page 4 of Petition and footnotes 2 and 3 thereto. The fifth named defendant on said list, Edward L. Merrigan, a lawyer, was and still is, counsel for defendant Maryland and Virginia Milk Producers Association, Inc.

Petitioners submit that defendant counsel, Edward L.

Merrigan, knew that the parties eight (8) years ago were not the same as those in the instant case, and also has full knowledge of the allegations against each of the many additional defendants named in the present "independent action" which are not the same.

As to the plea of statute of limitations, such do not apply to express trusts (continuing trusts).

Respectfully submitted,

Frank P. Parish, pro se

Theodore Fisher Parish, pro se

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

WILLIAM K. SLATE, II
CLERK

TELEPHONE 782-2213
AREA CODE 804
TENTH AND MAIN STREETS
RICHMOND, VIRGINIA 23219

November 15, 1978

Mr. Frank P. Parish
518 E. Baltimore Street
Taneytown, Maryland 21787

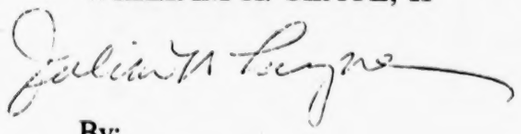
Re: No. 78-1079, Parish v. Maryland and Va. Milk Producers Assoc., Inc., etc.

Dear Mr. Parish:

Pursuant to our telephone conversation of today, please be advised that you have ninety (90) days from November 13, 1978, in which to file your petition for certiorari with the U.S. Supreme Court.

Sincerely yours,

WILLIAM K. SLATE, II



By:
Julian H. Layne
Deputy Clerk

JHL/epb/

APPENDIX B

JAMES E. CLICK, Secty. & Treas.,
Maryland and Virginia Milk Producers
Association, Inc.,
1530 Wilson Boulevard,
Arlington, Virginia 22209;

WILLIAM J. HUGHES, Jr.,
102 Oxford Street,
Chevy Chase, Maryland 20015;

AMERICAN DAIRY ASSOCIATION, AND
DIRECTORS THEREOF FROM 1963 TO
PRESENT DATE,
6300 North River Road,
Rosemont, Illinois 60018;

UNITED DAIRY INDUSTRY ASSN. and
MR. GLEN LAKE, President,
24270 West Seven Mile Road,
Detroit, Michigan 48219;

MR. PAUL HAND, Assistant General Manager
and Secretary of Interstate Milk Producers
Cooperative,
1225 Industrial Highway,
Southampton, Pennsylvania 18996;

MID-AMERICAN DAIRY ASSN., MEMBER OF
UNITED DAIRY INDUSTRY
ASSOCIATION,
S.S. Station 1837,
Springfield, Missouri 65805;

PRODUCER AGENCY OF F.O. #4, SERVE
MR. LESTER C. JONES,
Fostertown Road,
Medford, New Jersey 08055;

ATLANTIC DAIRY ASSOCIATION,
c/o DR. PAUL HAND, Asst. Gen. Mgr. and
Secretary of Interstate Milk Producers
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Rockville, Maryland 20850;

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****